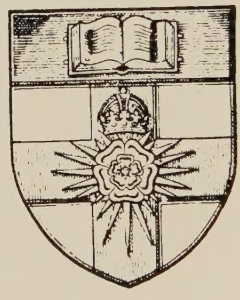
UNIVERSITY OF LONDON LIBRARY

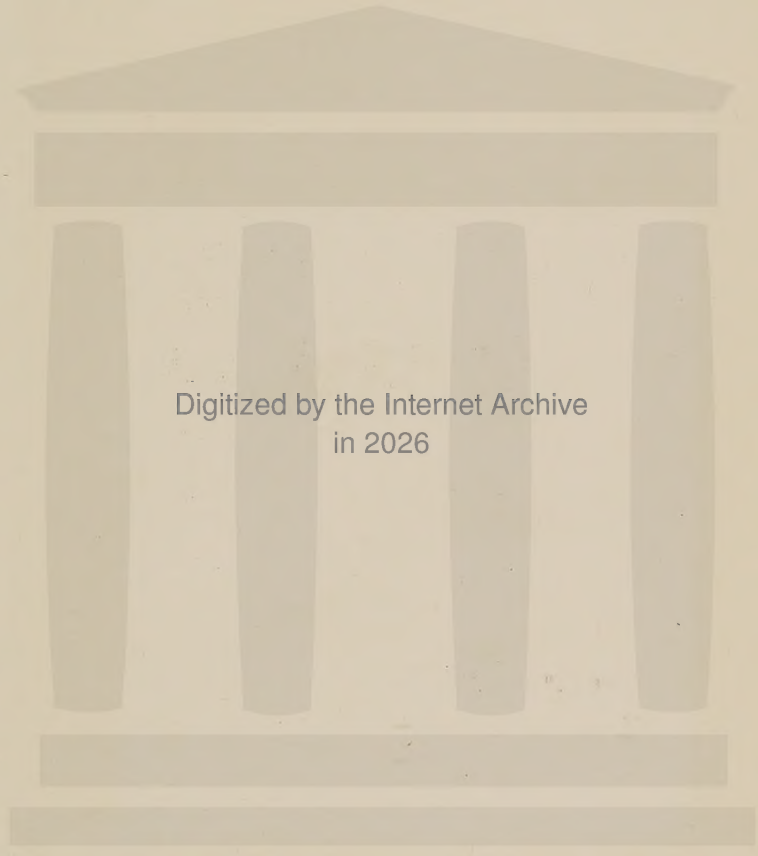
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

317

346.4
MxNorth
Reference Only



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-appeal-cases_1879-1880_5

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR HENRY JAMES, Knt., M.P. . .	ATTORNEY-GENERAL.
SIR FARRER HERSCHELL, Knt., M.P. .	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING	Serjeants' Inn.
W. B. GLASSE, Esq., Q.C. E. E. KAY, Esq., Q.C.	Lincoln's Inn.
JOHN BLOSSETT MAULE, Esq., Q.C. ARTHUR CHARLES, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. ALFRED WILLS, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie, Williams, & Williams), Lincoln's Inn Fields JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Son, & Coward), Mincing Lane, E.C.	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10 Old Square, Lincoln's Inn.

THE

LAW REPORTS.

5291

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

REPORTED BY

CHARLES CLARK, Queen's Counsel;
GERALD J. WHEELER, Barrister-at-Law;
HERBERT COWELL, Barrister-at-Law.

VOL. V.

1879-80.—XLIII & XLIV VICTORIÆ.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS, Limited,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1880.

BIBL. LOVAN. UNIV.

ERRATUM.

An erratum in Vol. IV. was misprinted. The word intended to be substituted was "*delectus*"—by mistake it was printed "*deluctus*."

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Archibald, Smith *v.* H. L. (Sc.)	489
Attorney-General *v.* Great Eastern Railway Company H. L. (E.)	473

B.

Banco de Portugal *v.* Waddell H. L. (E.)	161
Bank of New South Wales, Barclay *v.* – – – P. C.	374
Barclay *v.* Bank of New South Wales – – – P. C.	374
Barrow, City Bank *v.* H. L. (E.)	664
Bell *v.* Quebec (Corporation of) P. C.	84
Bishop of Oxford, Julius *v.* H. L. (E.)	214
Bolivian (National) Navigation Company *v.* Wilson H. L. (E.)	176
Bourgoin *v.* La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental P. C.	381
Bourne, Hooper *v.* H. L. (E.)	1
Brownlie *v.* Campbell H. L. (Sc.)	925

C.

	PAGE
Caledonian and Glasgow and South-Western Railway Companies, Dixon *v.* H. L. (Sc.)	820
Campbell *v.* Campbell H. L. (Sc.)	787
———, Brownlie *v.* H. L. (Sc.)	925
Carmichael *v.* Gee H. L. (E.)	588
Casaca, Reg. *v.* – – P. C.	548
City Bank *v.* Barrow H. L. (E.)	664
City of Glasgow Bank, Houldsworth *v.* – – H. L. (Sc.)	317
Clifford *v.* Koe – H. L. (I.)	447
Cushing *v.* Dupuy – P. C.	409
Cuvillier, Symes *v.* – P. C.	138

D.

Day, Robertson *v.* – P. C.	63
De Livera, Dias *v.* – P. C.	123
Dias *v.* De Livera – P. C.	123
Dixon *v.* Caledonian and Glasgow and South-Western Railway Companies H. L. (Sc.)	820
Dorion *v.* Les Ecclésiastiques	

BIBL. LONDIN UNIV.

		PAGE
du Séminaire de St. Sulpice de Montréal	– – P. C.	362
Dundas *v.* Waddell	H. L. (Sc.)	249
Dupuy, Cushing *v.*	– P. C.	409

E.

Ecclesiastical Commissioners of England and Wales *v.* Rowe	H. L. (E.)	736

F.

Fearnley, London Guarantie Company *v.*	– H. L. (E.)	911
Freccia, Sturla *v.*	– H. L. (E.)	623
Freeland, Postlethwaite *v.*	H. L. (E.)	599

G.

Gee, Carmichael *v.*	H. L. (E.)	588
Goldring *v.* La Banque d'Hochelaga	– – – P. C.	371
Great Eastern Railway Company, Attorney-General *v.*	H. L. (E.)	473
Guarantie (London) Company *v.* Fearnley	– H. L. (E.)	911

H.

Hill, Metropolitan Asylum District (Managers of) *v.*	H. L. (E.)	582
——, Trimble *v.*	– – P. C.	342
Hooper *v.* Bourne	– H. L. (E.)	1
Houldsworth *v.* City of Glasgow Bank	– – H. L. (Sc.)	317

J.

Jones, Pitt *v.*	– H. L. (E.)	651
Julius *v.* Oxford (Bishop of)	H. L. (E.)	214

K.

Koe, Clifford *v.*	– H. L. (I.)	447

L.

La Banque d'Hochelaga, Goldring *v.*	– – – P. C.	371
La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental, Bourgoin *v.*	P. C.	381
La Fontaine, Pitts *v.*	– P. C.	564
Lambkin *v.* South-Eastern Railway Company	– – P. C.	352
Lamont, Rankin *v.*	H. L. (Sc.)	44
Langlois, Valin *v.*	– P. C.	115
Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal, Dorion *v.*	– P. C.	362
Livingstone *v.* Rawyards Coal Company	– H. L. (Sc.)	25
London and Provincial Supply Association, Pharmaceutical Society *v.*	– H. L. (E.)	857
London Guarantie Company *v.* Fearnley	– – H. L. (E.)	911
Lord Advocate *v.* Lovat (Lord)	H. L. (Sc.)	273
Lovat (Lord), Lord Advocate *v.*	H. L. (Sc.)	273

M.

M'Donald *v.* M'Donald	H. L. (Sc.)	519
M'Kinlay, Steele *v.*	H. L. (Sc.)	754
Metropolitan Asylum District, (Managers of) *v.* Hill	H. L. (E.)	582
Metropolitan District Railway Company *v.* Sharpe	H. L. (E.)	425
Moseley, Pearks *v.*	H. L. (E.)	714
Musgrave *v.* Pulido	– P. C.	102
Mutual Society, Wallingford *v.*	H. L. (E.)	685

N.

National Bolivian Navigation Company *v.* Wilson	H. L. (E.)	176
Nicolle, *Ex parte*	– – P. C.	346

O.

Oriental Bank Corporation *v.* Wright	– – – P. C.	842
Oxford (Bishop of), Julius *v.*	H. L. (E.)	214

P.

		PAGE
Pearks *v.* Moseley	H. L. (E.)	714
Pearson *v.* Spence	– P. C.	70
Peninsular and Oriental Steam Navigation Company, Stoomvaart Maatschappy Nederland *v.*	– – H. L. (E.)	876
Pharmaceutical Society *v.* London and Provincial Supply Association	– H. L. (E.)	857
Pitt *v.* Jones	– H. L. (E.)	651
Pitts *v.* La Fontaine	– P. C.	564
Postlethwaite *v.* Freeland	H. L. (E.)	599
Pulido, Musgrave *v.*	– P. C.	102

Q.

Quebec (Corporation of), Bell *v.*	P. C.	84

R.

Rankin *v.* Lamont	H. L. (Sc.)	44
Rawyards Coal Company, Livingstone *v.*	– H. L. (Sc.)	25
Reg. *v.* Casaca	– – P. C.	548
Robertson *v.* Day	– – P. C.	63
Rowe, Ecclesiastical Commissioners of England and Wales *v.*	– – – H. L. (E.)	736

S.

Sharpe, Metropolitan District Railway Company *v.*	H. L. (E.)	425
Smith *v.* Archibald	H. L. (Sc.)	489
South-Eastern Railway Company, Lambkin *v.*	– P. C.	352
Spence, Pearson *v.*	– P. C.	70
Steele *v.* M'Kinlay	H. L. (Sc.)	754
Stoomvaart Maatschappy Nederland *v.* Peninsular and Oriental Steam Navigation Company	– – H. L. (E.)	876
Sturla *v.* Freccia	– H. L. (E.)	623
Symes *v.* Cuvillier	– P. C.	138

T.

Trimble *v.* Hill	– – P. C.	342

V.

Valin *v.* Langlois	– – P. C.	115

W.

Waddell, Banco De Portugal *v.*	H. L. (E.)	161
———, Dundas *v.*	H. L. (Sc.)	249
Wallingford *v.* Mutual Society	H. L. (E.)	685
Wilson, National Bolivian Navigation Company *v.*	H. L. (E.)	176
Wright, Oriental Bank Corporation *v.*	– – – P. C.	842

TABLE OF CASES CITED.

A.

		PAGE
Adair *v.* New River Company	11 Ves. 429	180
Adam, Ex parte	1 V. & B. 493; 2 Rose, 36	163
Adams *v.* Royal Mail Steam Packet Company	5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33	603
Adamson, Ex parte	8 Ch. D. 807	164
Addie *v.* Western Bank of Scotland	Law Rep. 1 H. L., Sc. 145	319
Alston, Ex parte	Law Rep. 4 Ch. 168	689
Altman *v.* Royal Aquarium Society	3 Ch. D. 228	860
Amaan *v.* Handyside	Court Sess. Cas. 3rd Series, vol. iii. 526	320
Ansell *v.* Baker	15 Q. B. 20	764
Archer *v.* Brittan	2 (N.Z.) App. Cas. 294	72
Armfield *v.* Allport	27 L. J. (Ex.) 42	762
Arnold *v.* Bishop of Bath and Wells	5 Bing. 316	627
Ashbury Carriage and Railway Company *v.* Riche	Law Rep. 7 H. L. 653	477
Ashcroft *v.* Crow-Orchard Colliery Company	Law Rep. 9 Q. B. 540	603
Attorney-General *v.* Conservators of the Thames	1 H. & M. 1	100
——— *v.* Köhler	9 H. L. C. 654	628
Attwood *v.* Small	6 Cl. & F. 232	165
Audsley *v.* Horn	26 Beav. 195; 1 D. F. & J. 226	451

B.

Backwell, Case of Alderman	1 Vern. 152	218
Baine *v.* Craig	Morr. 14,855; 1 Pat. App. 343	793
Baker *v.* Baker	6 H. L. C. 616	591
Barrington *v.* Tristram	6 Ves. 345	128
Barton *v.* Sheriff	2 Moo. P. C. 19	551
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	319
Batty *v.* Marriott	5 C. B. 819	344
Beckett *v.* Midland Railway Company	Law Rep. 3 C. P. 82	87
Behn *v.* Burness	3 B. & S. 751	914
Bell *v.* North Staffordshire Railway Company	4 Q. B. D. 205	689
—— *v.* Receiver of Land Revenue	1 App. Cas. 707	72
Bennett's Trusts, In re	Law Rep. 10 Ch. 490	164
Bettini *v.* Gye	1 Q. B. D. 183	914

		PAGE
Betts *v.* Great Eastern Railway Company	Law Rep. 8 Ex. 294; 3 Ex. D. 182	7
Birch *v.* Sherratt	Law Rep. 2 Ch. 644	592
Birmingham Canal Company *v.* Swindell	7 H. & N. 969	826
Blackwood *v.* London Chartered Bank	Law Rep. 5 P. C. 110	73
Blakemore *v.* Glamorganshire Canal Company	1 My. & K. 154; 1 Cl. & F. 262	477
Blanckensee *v.* Sharpley	3 Low. Can. Jur. 292	372
Blantyre (Lord) *v.* Wemyss (Earl of)	Court Sess. Cas. 1st Series, vol. xvi. 1009; 3 Bell's App. 34	258
Bonafous *v.* Rybot	3 Burr. 1370	689
Boone *v.* Eyre	1 H. Bl. 273, n.	914
Boraston's Case	3 Rep. 19	721
Bowes *v.* Shand	2 App. Cas. 455	914
Boyd *v.* Croydon Railway Company	4 Bing. N. C. 669	860
Bradley *v.* Cartwright	Law Rep. 2 C. P. 511	450
Breadalbane *v.* M'Gregor	7 Bell, App. 43	496
Bricker *v.* Whatley	1 Vern. 233	127
Bridgman, In re	1 Dr. & Sm. 164; 29 L. J. (Ch.) 844	220
Brigg's Trustees, In re	Court Sess. Cas. 2nd Series, vol. xiv. 173	930
Broadhurst *v.* Morris	2 B. & Ad. 1	452
Bromfield *v.* Crowder	1 B. & P. (N.R.) 313	721
Brooke *v.* Garrod	2 De G. & J. 62	825
Brown *v.* Gugy	2 Moo. P. C. (N.S.) 341	88
Buccleuch (Duke of) *v.* Common Agent of Inveresk	Court Sess. Cas, 3rd Series, vol. vii. 95	258
Buffar *v.* Bradford	2 Atk. 220	452
Burke *v.* Rooney	4 C. P. D. 226	689
Burmester *v.* Hodgson	2 Camp. 488	608
Burnes *v.* Pennell	2 H. L. C. 497: 6 Bell's App. 541	319
Buron *v.* Denman	2 Ex. 167	104
Burridge *v.* Sussex (Earl of)	2 Ld. Raym. 1292	627
Burrowes *v.* Lock	10 Ves. 470	932
Butcher *v.* Butcher	1 V. & B. 98	933
Butler *v.* Lowe	10 Sim. 317	128
Byng *v.* Byng	10 H. L. C. 171	451
Bywell Castle, The	4 P. D. 219	890

C.

Caledonian Railway Company *v.* Ogilvy	2 Macq. 229	99
Cameron *v.* Kyte	3 Knapp, P. C. 332	104
Campbell *v.* Campbell	Morr. 14, 855; 1 Pat. App. 343	791
Canadian Bank of Commerce *v.* Brown	19 Low. Can. Jur. 110	372
Carr *v.* Marsh	2 Phillim. 198	219
Carret *v.* Gilbert	Sirey, 1864, Pt. II. 183	412
Cassils *v.* Crawford	Q. B. Montreal, March, 1876	669
Cattlin *v.* Brown	11 Hare, 372	717
Chamberlain *v.* King	Law Rep. 6 C. P. 474	551
Chambers *v.* Bernasconi	1 C. M. & R. 347	638
Clarke *v.* Dixon	E. B. & E. 148	338
——— *v.* Manning	7 Beav. 167	932
Clydesdale Bank *v.* Paul	Court Sess. Cas. 4th Series, vol. iv. 626	319

		PAGE
Cockerell *v.* Dickens	3 Moo. P. C. 98	164
Cole *v.* North-Western Bank	Law Rep. 10 C. P. 354	667
Collins *v.* Maule	8 C. & P. 504	626
Collow's Trustees *v.* Connell	Court Sess. Cas. 3rd Series, vol. iv. 465	795
Cornfoot *v.* Fowke	6 M. & W. 358	319
Commissioners of Sewers *v.* Gellatly	3 Ch. D. 610	180
Cooper *v.* London, Brighton, &c., Railway Company	4 Ex. D. 88	914
Corpus Christi College *v.* Rogers	49 L. J. (Ex.) 4	742
Corrigall *v.* London and Blackwall Railway Company	2 Dowl. (N.S.) 851; 12 L. J. (C.P.) 209	428
Cortis *v.* Kent Waterworks Company	7 B. & C. 314	860
Crake *v.* Powell	2 E. & B. 210	218
Creed *v.* Fisher	9 Ex. 472	353
Crom *v.* Samuels	2 C. P. D. 21	689
Cunningham *v.* Dunn	3 C. P. D. 443	604
Cutter *v.* Powell	2 Sm. L. C. 4th Ed. 1	915
Cuvillier *v.* Aylwin	2 Knapp, P. C. 72	411

D.

Davidson *v.* Dallas	14 Ves. 576	129
Davies *v.* McVeagh	4 Ex. D. 265	604
Deans of Chapel Royal *v.* Johnstone	Court Sess. Cas. 3rd Series, vol. vii. 19	258
Defflis *v.* Goldschmidt	2 Mer. 417; 19 Ves. 566	128
Denton *v.* Great Northern Railway Company	5 E. & B. 860; 25 L. J. (Q.B.) 134	72, 319
Denyssen *v.* Mostert	Law Rep. 4 P. C. 236	136
D'Epinay *v.* Cockerell	1 Moo. P. C. 103	164
D'Eresby *v.* Spier	14 Scot. Law Rep. 162	258
De Virte *v.* Wilson	Court Sess. Cas. 4th Series, vol. v. 328	525
Devon, Earldom of	Sir Harris Nicholas' Report, Append. xxiv.	627
Digby *v.* Alexander	8 Bing. 416	104
Diggle *v.* Higgs	2 Ex. D. 422	343
Ditcher *v.* Denison	Cited 4 Q. B. D. 273	217
Doe *v.* Burnsall	6 T. R. 30	452
—— *v.* Nowell	1 M. & S. 327	721
—— *v.* Turford	3 B. & Ad. 890	626
Don *v.* Watt	Court Sess. Cas. 3rd Series, vol. ii. 963	760
Drinkwater *v.* Ratcliffe	Law Rep. 20 Eq. 528	652
Dumbarton (Town of) *v.* Graham	6 Pat. App. 163	279
Duckworth, In re	Law Rep. 2 Ch. 580	321
Dudley Canal Navigation *v.* Grazebrook	1 B. & A. 59	825
Dundas *v.* Drummond	Morr. 15,035	48
——— *v.* Dundas	Morr. 15,585; 2 Pat. App. 618	794
Dungannon *v.* Smith	12 Cl. & F. 574	717
Dyce *v.* Hay	Court Sess. Cas. 2nd Series, vol. xi. 1266; 1 Macq. 305	495
Dyer *v.* Carruthers	Court Sess. Cas. 4th Series, vol. i. 943	793

E.

		PAGE
Eastern Counties Railway Company *v.* Hawkes	5 H. L. C. 331	477
Eastwood *v.* Avison	Law Rep. 4 Ex. 141	450
Ebbs *v.* Boulnois	Law Rep. 10 Ch. 479	164
Edgell *v.* Francis	1 Man. & G. 222	353
Edwards *v.* Hammond	3 Lev. 132	721
Erichsen *v.* Barkworth	3 H. & N. 601	604
Erskine *v.* Common Agent of Crail	Court Sess. Cas. 3rd Series, vol. iii. 49	260
Ex-Rajah of Coorg *v.* East India Company	29 Beav. 300	113

F.

Fanny Carvill, The	2 Asp. Mar. Law Cas. 478; Law Rep. 4 A. & E. 422; on app. 2 Asp. Mar. Law Cas. 565	879
Farquharson *v.* Farquharson	Morr. 2290; 6 Patt. App. 724	791
Fentham, The	Law Rep. 3 P. C. 212	893
Ferrers *v.* Staffordshire Railway Company	Law Rep. 13 Eq. 524	429
Ferrier's Trustees *v.* Bayley	Court Sess. Cas. 4th Series, vol. iv. 738	48
Festing *v.* Allen	13 M. & W. 279	730
Fisher *v.* Bridges	3 E. & B. 642	689
Fitzhardinge (Lord) *v.* Gloucester and Berkeley Canal Company	Law Rep. 7 Q. B. 776	429
Fleming *v.* Fleming	Morr. *voce* "Implied Will," App. No. 1	794
Flight *v.* Barton	3 My. & K. 282	932
Ford *v.* Cotesworth	Law Rep. 4 Q. B. 127; Ibid. 5 Q. B. 545	602
Forester *v.* Secretary of State	Law Rep. Ind. App. Supp. Vol. 10	105
Forster *v.* Mackinnon	Law Rep. 4 C. P. 704	762
Forth Main Insurance Company *v.* Burns	Court Sess. Cas. 2nd Series, vol. x. 689	319
Foster *v.* Smith	1 Ph. 629; 15 L. J. (Ch.) 183	592
Fox *v.* Wallis	2 C. P. D. 45	689
Francis *v.* Wigzel	1 Madd. 258	566
Frood *v.* Stair (Earl of)	Court Sess. Cas. 4th Series, vol. ii. 76	260

G.

Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	397
Gibbons *v.* London Financial Association	4 C. P. D. 263	689
Gilbert *v.* Boorman	11 Ves. 238	128
Glendowyn *v.* Gordon	Law Rep. 2 H. L., Sc. 317	791
Goldsmid *v.* Cazenove	7 H. L. C. 785	163
Gooch *v.* Gooch	14 Beav. 565; 3 D. M. & G. 366	128
Gordon *v.* Hughes	Fac. Col. vol. xviii. 428; 1 Bli. 287	931
——— *v.* Whieldon	11 Beav. 170	125
Gould *v.* Staffordshire Potteries Company	5 Ex. 214	429

		PAGE
Gowlett *v.* Hanforth	2 W. Bl. 958.	689
Graham-Bonar *v.* Lord Advocate	Court Sess. Cas. 3rd Series, vol. ix. 58	258
Graves *v.* Legg	9 Ex. 709	914
Gray *v.* Gray	Court Sess. Cas. 4th Series, vol. v. 820	792
Great Laxey Mining Company *v.* Clague	4 App. Cas. 115	388
Great Western Railway Co. *v.* Baby	12 Q. B. Upp. Can. 106	388
——— *v.* Bennett	Law Rep. 2 H. L. 27	24
——— *v.* Birmingham and Oxford Junction Railway Company	2 Ph. 597	397
——— *v.* Fletcher	5 H. & N. 689	825
——— *v.* May	Law Rep. 7 H. L. 283	7
Greenwood *v.* Roberts	15 Beav. 92; 21 L. J. (Ch.) 262	718
Grey *v.* Pearson	6 H. L. C. 61	128
Grieve *v.* Grieve	Law Rep. 4 Eq. 180	450
Gugy *v.* Ferguson	12 Low. Can. Rep. 254	372
Gwinell *v.* Herbert	5 A. & E. 439	769

H.

Hale *v.* Hale	3 Ch. D. 643	718
Hall *v.* Hill	1 D. & War. 94	791
Hamilton *v.* Montgomery	Court Sess. Cas. 1st Series, vol. i. 361	930
——— (Magistrates of) *v.* Swim	Court Sess. Cas. 2nd Series, vol. xvi. 437	48
Hampden *v.* Walsh	1 Q. B. D. 189	345
Harris *v.* Dreesman	23 L. J. (Ex.) 210	619
Harrison's Case	Leach, C. C. 166	861
Hart *v.* Swaine	7 Ch. D. 42	933
Hatfield *v.* Phillips	12 Cl. & F. 343	667
Henderson *v.* Lacon	Law Rep. 5 Eq. 249	689
——— *v.* Minto (Earl of)	Court Sess. Cas. vol. xxii. 1126	494
Hensman *v.* Fryer	Law Rep. 3 Ch. 420	128
Hereford (Mayor of) *v.* Morton	15 L. T. (N.S.) 187	859
Hern *v.* Nichols	1 Salk. 288	319
Heron *v.* Stokes	1 D. & War. 89	452
Heyman *v.* Flewker	13 C. B. (N.S.) 519	667
Hibernia, The	2 Asp. Mar. Law Cas. 454	879
Hill *v.* Bigge	3 Moo. P. C. 465	107
—— *v.* Lewis	1 Salk. 133	772
—— *v.* Mackay	Court Sess. Cas. 1st Series, vol. ii. (1st ed.) 681; 2nd ed) 574	48
Hilton *v.* Woods	Law Rep. 4 Eq. 432	28
Hindhaugh *v.* Blakey	3 C. P. D. 136	761
Hockley *v.* Mawbey	1 Ves. 143; 3 Bro. C. C. 82	450
Hogan *v.* Curtis	6 Sup. Court Rep. 292	345
Holdsworth *v.* Wilson	2 B. & S. 480; 4 B. & S. 1	429
Holmes *v.* Penney	3 K. & J. 90	566
Honey, Ex parte	Law Rep. 7 Ch. 178	164
Hopetown (Earl of) *v.* Ramsay	Court. Sess. Cas. 2nd Series, vol. iii. 685; 5 Bell's App. 69	258
Hudson *v.* Ede	Law Rep. 2 Q. B. 566; Ibid. 3 Q. B. 412	613

		PAGE
Hunter *v.* Stewart	4 D. F. & J. 168	180
Hutcheson *v.* Cassillis (Earl of)	Morr. 14,788	258
Hutchinson *v.* Gillespie	4 Moo. P. C. 378	157
Hyslop *v.* Shaw	Court Sess. Cas. 3rd Series, vol. i. 535	48

I.

Inglis *v.* Battery	3 App. Cas. 255	814
Irish Society *v.* Bishop of Derry	12 Cl. & F. 641	627

J.

Jackson *v.* Duchaire	3 T. R. 551	764
——— *v.* Hudson	2 Camp. 447	761
James *v.* Thomas	5 B. & Ad. 40	690
Jardine *v.* Carron Company	Court Sess. Cas. 3rd Series, vol. ii. 1101	319
Jee *v.* Audley	1 Cox, 324	718
Jeffrey *v.* Vitre	24 Beav. 296	451
Jegon *v.* Vivian	Law Rep. 6 Ch. 742	28
Jesson *v.* Wright	2 Bli. 1	452
Johnson *v.* Crédit Lyonnais Company	2 C. P. D. 224; 3 C. P. D. 32	667
Johnston *v.* St. Andrew's (Minister of)	3 App. Cas. 159	411
Jones *v.* Harrison	6 Ex. 328	242

K.

Kavanagh *v.* Morland	Kay, 16; 23 L. J. (Ch.) 41	451
Kearon *v.* Pearson	7 H. & N. 386	619
Kemble *v.* Farren	6 Bing. 141	915
King *v.* Montague	4 B. & C. 598	88

L.

Lacey *v.* Hill	Law Rep. 8 Ch. 441	164
Lancefield *v.* Iggulden	Law Rep. 10 Ch. 136	128
Laws and Her Majesty's Ordnance, In re	1 Ex. 441	427
Leake *v.* Robinson	2 Mer. 363	718
Lefebvre *v.* Gosselin	9 Low Can. Jur. 95	365
Legge *v.* Croker	1 Ball & B. 506	931
Leitch *v.* Leitch	3 W. & S. 366	791
Les Sœurs Dames Hospitalières, &c., Montréal *v.* Middlemiss	3 App. Cas. 1102	144
Lewis *v.* Rossiter	44 L. J. (Ex.) 136	429
Lloyd *v.* Wooddall	1 W. Bl. 29	626
London and South Western Bank *v.* Wentworth	5 Ex. D. 96	762
Lord Advocate *v.* Blantyre (Lord)	4 App. Cas. 791	279
——— *v.* Cathcart	Court Sess. Cas. 3rd Series, vol. ix. 744	279
——— *v.* McCulloch	Court Sess. Cas 4th Series, vol. ii. 27	281
——— *v.* Sinclair	Court Sess. Cas. 3rd Series, vol. v. (H. L.) 105	281

		PAGE
Luby *v.* Wodehouse (Lord)	17 Ir. Com. Law Rep. 618	104
Luce *v.* Izod	1 H. & N. 245; 25 L. J. (Ex.) 307	375
Lyall *v.* Edwards	6 H. & N. 337	375
Lyon *v.* Fishmongers' Company	1 App. Cas. 662	87

M.

Maccabe *v.* Hussey	2 Dow. & Cl. 440	165
Macdougall *v.* Foyer	F. C. vol. xv. 579	764
——— *v.* Paterson	11 C. B. 755; 21 L. J. (C.P.) 27	218
McHenry *v.* Davies	Law Rep. 10 Eq. 88	566
Mackay *v.* Commercial Bank of New Brunswick	Law Rep. 5 P. C. 394	319
Mackenzie *v.* Learmouth	Court Sess. Cas. 2nd Series, vol. xii. 132	494
Mackintosh *v.* Elderfield	Law Rep. 4 Ch. 207	690
Magnet, The	Law Rep. 4 A. & E. 417	879
Maidman *v.* Malpas	1 Hag. Cons. 205	245
Manchester Mills	1 Doug. 222, n.	180
Mann *v.* Thompson	Kay, 638	128
Marois, In re	15 Moo. P. C. 189	411
Martin *v.* Porter	5 M. & W. 351	28
Martineau *v.* Briggs	23 W. R. 889	128
Matthews *v.* Bloxsome	3 L. J. (Q. B.) 209	761
——— *v.* Port	Comb. 63	627
May *v.* Bennett	1 Russ. 370	593
Meer Reasat Hossein *v.* Hadjee Abdoollah	Law Rep. 1 Ind. App. 72	412
Merest *v.* James	1 Brod. & B. 484	452
Merrick *v.* Wakley	8 A. & E. 170	643
Metropolitan Board of Works *v.* McCarthy	Law Rep. 7 H. L. 243	87
Miles *v.* Rose	5 Taunt. 705	86
Miller *v.* Huddleston	3 Mac. & G. 513; 21 L. J. (Ch.) 1	592
Milne *v.* Young	Court Sess. Cas. 2nd Series, vol. ix. 286	494
Modee Kaikhooscrow Hormusjee *v.* Cooverbhaee	6 Moo. Ind. App. Cas. 448	411
Mogg *v.* Mogg	1 Mer. 654	128
Moir *v.* Royal Exchange Assurance Company	3 M. & S. 461	604
Montague *v.* Perkins	22 L. J. (C. P.) 187	762
Montgomery *v.* Montgomery	3 J. & Lat. 47; 8 Ir. Eq. Rep. 740	452
Montreal *v.* Drummond	1 App. Cas. 384	88
Moray (Earl of) *v.* Inglis	Court Sess. Cas. 1st Series, vol. xv. 2	260
Morgan *v.* Powell	3 Q. B. 278	28
Morisse *v.* Royal British Bank	1 C. B. (N. S.) 67; 26 L. J. (C. P.) 62	218
Morrison's Trustees *v.* Webster	Court Sess. Cas. vol. v. 800	48
Morse *v.* Morse	2 Sim. 425	451
Moseley's Trusts, In re	Law Rep. 11 Eq. 499	720
Mostyn *v.* Fabrigas	Cowp. 170	104
Moyce *v.* Newington	4 Q. B. D. 32	667
Murray *v.* Macpherson	5 Low. Can. Rep. 359	365
Muskett *v.* Eaton	1 Ch. D. 435	721
Musselburgh (Magistrates of) *v.* Brown	Morr. 15,038	48

N.

		PAGE
Nabob of the Carnatic *v.* East India Company	1 Ves. 371; 2 Ves. 56	104
National Exchange Company of Glasgow *v.* Drew	2 Macq. 103	319
Nelson *v.* Dahl	12 Ch. D. 568	604
New Brunswick Railway Company *v.* Conybeare	9 H. L. C. 711	322
Newcastle (Corporation of) *v.* Attorney-General	12 Cl. & F. 402	859
Newport Bridge, In re	2 E. & E. 377	221
Nugent *v.* Smith	1 C. P. D. 19, 423	354

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	321
Olivant *v.* Wright	1 Ch. D. 46	129
Orr *v.* Glasgow (Earl of)	Court Sess. Cas. 3rd Series, vol. v. 195	259

P.

Page *v.* Leapingwell	18 Ves. 463	592
Paine *v.* Wagner	12 Sim. 184	129
Paterson *v.* Tash	2 Str. 1178	667
Payler *v.* Homersham	4 M. & S. 423	375
Pemberton *v.* Barnes	Law Rep. 6 Ch. 685	652
Pennsylvania (State of) *v.* Wheeling and Belmont Bridge Company	13 Howard Sup. Ct. Rep. 518	87
Penny *v.* Innes	1 C. M. & R. 439	961
Perth (Town of) *v.* Gray	Morr. 12,792; 1 Pat. App. Cas. 645	279
Phillips *v.* Eyre	Law Rep. 4 Q. B. 225; 38 L. J. (Q.B.) 113	104
——— *v.* Foxall	Law Rep. 7 Q. B. 666	915
——— *v.* Homfray	Law Rep. 6 Ch. 770	28
——— *v.* South-Western Railway Company	4 Q. B. D. 406; 48 L. J. (Q. B.) 693	353
Piggott *v.* Colvill	Court Sess. Cas. vol. viii. 213	48
Pitton *v.* Walter	1 Str. 162	627
Pordage *v.* Powell	1 Wms. Saund. 319	915
Porter *v.* Lopes	7 Ch. 358	653
——— *v.* Shephard	6 T. R. 665	914
Postmaster-General, Ex parte	10 Ch. D. 595	164
Poussard *v.* Spiers	1 Q. B. D. 410	914
Powdrell *v.* Sealy	2 (N.Z.) App. Cas. 394	72
Price *v.* Littlewood	3 Camp. 288	626
——— *v.* Torrington (Lord)	1 Salk. 285; 2 Ld. Raym. 873	640
Pritt *v.* Fairclough	3 Camp. 305	626

Q.

Queensbury (Marquis of) *v.* Wright	Court Sess. Cas. 1st Series, vol. xiv. 1021	259
Quintin *v.* Girard	2 Low Can. Jur. 141	146

R.

		PAGE
Race *v.* Ward	4 E. & B. 702	495
Railroad Company *v.* Reeves	10 Wallace's Rep. 176	354
Rajah Salig Ram *v.* Secretary of State for India	Law Rep. Ind. App. Supp. 119	113
Randall *v.* Lynch	2 Camp. 352	602
——— *v.* Roper	27 L. J. (Q.B.) 266	375
Rangeley *v.* Midland Railway Company	Law Rep. 3 Ch. 306	365
Ranger *v.* Great Western Railway Company	5 H. L. C. 72	322
Raynard *v.* Chace	1 Burr. 2	861
Reedie *v.* London and North-Western Railway Company	4 Ex. 244	319
Reg. *v.* Birmingham	1 B. & S. 763	626
—— *v.* Chichester (Bishop of)	2 E. & E. 209	220
—— *v.* Cooke	2 B. & C. 871	104
—— *v.* Eduljee Byramjee	5 Moo. 276	411
—— *v.* Great North of England Railway Company	9 Q. B. 315	860
—— *v.* London (Lord Mayor of)	Law Rep. 2 Q. B. 292	428
—— *v.* Stephenson	5 Moo. 296	411
—— *v.* Surrey (Justices of)	Law Rep. 5 Q. B. 466	246
—— *v.* Tewkesbury (Mayor of)	Law Rep. 3 Q. B. 635	146
—— *v.* Tithe Commissioners	14 Q. B. 459	219
—— *v.* Ward	Law Rep. 8 Q. B. 210	246
—— *v.* York (Corporation of)	1 E. & B 588	220
Rex *v.* Barlow	2 Salk. 609	218
—— *v.* Debenham	2 B. & Ald. 185	643
—— *v.* Havering-atte-Bower	5 B. & Ald. 691	219
—— *v.* Parry	6 A. & E. 810	246
—— *v.* Rector of Lambeth	8 A. & E. 356	246
—— *v.* Rotherham Local Board	8 E. & B. 906	244
—— *v.* Stacey	1 T. R. 1	246
Reynal, Ex parte	16 L. J. (Q.B.) 304	428
Ricardo Schmidt, The	Law Rep. 1 P. C. 268; 4 Moo. P. C. (N.S.) 121	551
Richmond Waterworks *v.* Richmond Company	3 Ch. D. 82	397
Right *v.* Creber	5 B. & C. 866	128
Riley *v.* Garnett	3 De G. & Sm. 629	721
Ringrose *v.* Bramham	2 Cox, 384	128
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	890
Roberts *v.* Brett	11 H. L. C. 337	914
Robinson *v.* Robinson	1 Burr. 38	452
Roddy *v.* Fitzgerald	6 H. L. C. 823	451
Rodgers *v.* Forresters	2 Camp. 483	608
Rossmore's Trustees *v.* Brownlie	Court Sess Cas. vol. v. 701	48
Roughton *v.* Gibson	46 L. J. (Ch.) 366	653
Rowland *v.* Morgan	2 Ph. 764	452
Rowley *v.* London and North Western Railway Company	Law Rep. 8 Ex. 221	526
Runtz *v.* Sheffield	4 Ex. D. 150	689
Russel *v.* Langstaffe	2 Doug. 514	762
Russell *v.* Sealy	2 (N. Z.) App. Cas. 498	72

S.

St. Rochin *v.* Duchesne	3 Low. Can. Jur. 183	144
Salmon *v.* Salmon	29 Beav. 27	717

		PAGE
Sanderson *v.* Aston	Law Rep. 8 Ex. 73	915
——— *v.* Lees	Court Sess. Cas. vol. xxii. 24	495
Sauvageau *v.* Gauthier	Law Rep. 5 P. C. 500	372
Scholefield *v.* Templer	Joh. 155; 28 L. J. (Ch.) 452	322
Scott *v.* Harwood	5 Madd. 332	128
Seale *v.* Barter	2 B. & P. 485	450
Seaman *v.* Ward	22 Beav. 591	718
Secretary of State for India in Council *v.* Kamachee Sahiba	13 Moo. P. C. 22	104
Selkrig *v.* Davies	2 Dow. 230; 2 Rose, 97, 291	167
Sharp *v.* Harvey	Morr. App. *voc.* Bill of Exchange, 2	764
Shrewsbury and Birmingham Railway Company *v.* North Western, &c., Railway Companies	6 H. L. C. 113	477
Shrewsbury Case	7 H. L. C. 1	628
Sivright *v.* Straiton Estate Company	Court Sess. Cas. vol. v. 922	48
Skipworth *v.* Skipworth	9 Beav. 135	388
Slim *v.* Croucher	1 D. F. & J. 518	933
Smeeton *v.* Collier	1 Ex. 457	690
Smith *v.* Argyle (Duke of)	Morr. 12,215	259
——— *v.* Blakey	Law Rep. 2 Q. B. 326	626
——— *v.* Great Western Railway Company	3 App. Cas. 165	825
——— *v.* Smith	Law Rep. 5 Ch. 342	717
Spencer *v.* Harding	Law Rep. 5 C. P. 563	72
Sprackling *v.* Ranier	1 Dick. 344	128
Stainer *v.* Droitwich	1 Salk. 281	627
Stavers *v.* Curling	3 Bing. N. C. 355	915
Stead *v.* Heaton	4 T. R. 669	626
Stirling *v.* Du Barry	5 Q. B. D. 65	689
Stone, Ex parte	Law Rep. 8 Ch. 914	164
——— *v.* City Bank	3 C. P. D. 282	321
Storrs *v.* Benbow	2 My. & K. 46; 3 D. M. & G. 390	128
Stourbridge Navigation *v.* Dudley (Earl of)	3 E. & E. 409; 30 L. J. (Q.B.) 108	825
Stuart *v.* McBarnet	Court Sess. Cas. 3rd Series, vol. vi. (H.L.), 123	279
Supervisors *v.* United States	4 Wall. 435	240
Swift *v.* Jewsbury	Law Rep. 9 Q. B. 301	319
—— *v.* Winterbotham	Law Rep. 8 Q. B. 244	319
Swire *v.* Francis	3 App. Cas. 106	319

T.

Tandy *v.* Westmoreland (Earl of)	27 How. St. Tr. 1246	104
Tapscott *v.* Balfour	Law Rep. 8 C. P. 46	603
Tarbottom *v.* Earle	11 W. R. 680	592
Taylor *v.* Great Northern Railway Company	Law Rep. 1 C. P. 385	605
Théberge *v.* Laudry	2 App. Cas. 102	411
Thiis *v.* Byers	1 Q. B. D. 244	604
Thompson *v.* Hudson	Law Rep. 4 H. L. 1	690
Thoms *v.* Thoms	Court Sess. Cas. 3rd Series, vol. vi. 704	790
Thomson *v.* Lord Advocate	Court Sess. Cas. 3rd Series, vol. x. 849	258

		PAGE
Thomson *v.* Zetland (Earl of)	Court Sess. Cas. 3rd Series, vol. vii. 99	260
Towns *v.* Wentworth	11 Moo. P. C. 526	128
Townshend *v.* Early	28 Beav. 429	128
Traill *v.* Smith's Trustees	Court Sess. Cas. 4th Series, vol. iii. 770	319
Trimmer *v.* Bayne	7 Ves. 508	791
Tuff *v.* Warman	2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322	892
Tussaud *v.* Tussaud	9 Ch. D. 363	791

U.

United Merthyr Collieries Company, In re	Law Rep. 15 Eq. 46	28

V.

Vaux Peerage	5 Cl. & F. 526	628
Vernon *v.* Manners	Plowd. 425	627

W.

Wainford *v.* Heyl	Law Rep. 20 Eq. 321	566
Warden and Assistants of Dover *v.* London, Chatham, and Dover Railway Company	3 D. F. & J. 559	477
Ware *v.* Regent's Canal Company	9 Ex. 395	388
Warren *v.* Warren	4 Tyrw. 850; 1 C. M. & R. 150	626
Warrington *v.* Warrington	2 Hare, 54	129
Waterhouse *v.* Jamieson	Law Rep. 2 H. L., Sc. 37	321
Watters' Petition	F. C. vol. xix. p. 489	761
Webb *v.* Russell	3 T. R. 393	748
Webster *v.* Boddington	26 Beav. 137	717
Wedge *v.* Berkeley	6 A. & E. 663	551
Weir *v.* Barnett	3 Ex. D. 32	319
—— *v.* Bell	3 Ex. D. 238	319
—— *v.* Steill	Morr. 11,359	794
Weld *v.* South Western Railway Company	32 Beav. 340	428
Wharton Peerage	12 Cl. & F. 295	629
Wild *v.* Holt	9 M. & W. 672	28
Wild's Case	6 Rep. 17	449
Wilde *v.* Gibson	1 H. L. C. 626	931
William *v.* Macline's Trustees	Court Sess. Cas. 3rd Series, vol. x. 362	793
Williams *v.* Carwardine	4 B. & A. 623	72
———— *v.* Games	Law Rep. 10 Ch. 204	653
Wilson, Ex parte	Law Rep. 7 Ch. 490	164
——— *v.* Wilson	28 L. J. (Ch.) 95	717
Wood *v.* Morewood	3 Q. B. 440, n.	28
Worsley *v.* Wood	6 T. R. 710	914
Worthington *v.* Local Board of Moss Side	Law Rep. 1 Q. B. 63	244
Wright *v.* Callender	2 D. M. & G. 652	591

		PAGE
Wright *v.* New Zealand Shipping Company	4 Ex. D. 165, n.	602
Wylde, In re	2 D. M. & G. 724	129
Wyrley and Essington Canal *v.* Bradley	7 East, 363	825

Y.

Yeo *v.* Tatum	Law Rep. 3 P. C. 696	397
Yester (Minister of) *v.* Tweeddale	Court Sess. Cas. 3rd Series, vol. v. 592	259
York and North Midland Railway Company *v.* Reg.	1 E. & B. 858	220

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

EDWARD LOUIS HOOPER AND H. F. HOOPER . . . . . } APPELLANTS;

AND

JOHN BOURNE, THE WESTBURY IRON COMPANY, AND THE GREAT WESTERN RAILWAY COMPANY . . . } RESPONDENTS.

H. L. (E.)
1880
Feb. 9.

Rai'way—Superfluous Land—Onus of Proof—Presumption.

A railway company purchased, by private agreement, without any preliminary notice to treat, certain lands, in amount nineteen acres, under which were mines of iron ore. These mines were specifically conveyed to the company. By the private Act incorporating the company the railway was to be finished in 1851. By warrant of the Railway Commissioners that time was extended to 1853. The company had used six of the nineteen acres in railway works—on certain spots of the remaining thirteen acres a drain, a cesspool, and a passage for water supply had been constructed, but no buildings had been erected, nor rails laid down. The railway was finished, but at the expiration of ten years from 1853 no sale of the lands took place. In December, 1849, the company had let the lands to a tenant from year to

H. L. (E.)
1880
HOOPER
v.
BOURNE.

year, and he used them for agricultural purposes. In August, 1871, the company let the lands (again under a tenancy from year to year) to an iron mining company under a license to work the iron ore. In each of these agreements the directors reserved the absolute right (in the case of the iron company upon twenty-eight days' notice), to re-enter on the lands, and in the lease to the iron company the mining was to be done subject to the approval of the railway company and of that company's engineer. In 1875 an action of ejectment was brought to recover the lands as lands which, under sect. 127 of the *Lands Clauses Act*, 8 & 9 Vict. c. 18, had vested in the Plaintiffs as "adjoining owners." There was a reference to a barrister to state a case for the opinion of the Court. The case set forth in one of the paragraphs, that since 1868 the railway traffic had much increased, and that the lands "had been, and still were, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic," and gave reasons of business which had influenced the railway directors in not making these sidings. The Queen's Bench Division had held that under these circumstances the lands were not to be considered as "superfluous land" which became vested in the adjoining owner—and that decision was affirmed by the Court of Appeal:—

Held, that the decisions of the Courts below must be affirmed.

In a case of this kind the burden of proving a title to the land, as superflous land, lies upon the claimant.

The mere fact that the land has not been built upon is not conclusive—all the circumstances must be considered.

The fact that the lands were in the neighbourhood of a populous town was a circumstance to raise a presumption that the lands would be wanted on account of increased traffic on the railway.

And, *semble*, that the fact that they were so wanted in 1868 raised a reasonable presumption that in 1863 the want of them for railway purposes had been foreseen.

Per THE LORD CHANCELLOR (Earl *Cairns*):—If a railway company purchases land and the minerals under its surface, and the surface is not at that time wanted for the purposes of the railway, but afterwards becomes so, and can be used without requiring the support of the minerals, *quære* whether there is any authority which requires the company to sell the minerals apart from the land, or, in default of such sale, vests them in the adjoining owner.

Per LORD HATHERLEY:—Questions as to superflous lands have proceeded, at all times, upon the *bona fides* of the transaction.

Per LORD O'HAGAN:—An actual present intention to employ the land for the purposes of the railway need not have been formed within the prescribed time, in order to prevent a forfeiture at the end of it.

EJECTMENT (brought in May, 1875), for certain pieces of land in the parish of *Westbury*, in the county of *Wilts*, situated close to the *Westbury Station* of the *Great Western Railway*.

The case came on for trial at *Salisbury*, and was then referred to Mr. *Kingdon*, Q.C., who stated a special case for the opinion of

the Court (1). The facts were in substance these. In 1845, an Act was passed for incorporating a company called the *Wilts, Somerset, and Weymouth Railway Company*, for the purpose of making a railway from the *Great Western Railway* to *Salisbury* and *Weymouth*. With this Act the *Lands Clauses* and the *Railways Clauses Acts* were incorporated. An Amendment Act was passed in 1846 specially referring to the making of a railway in the parish of *Westbury*, the time for the completion of which was to expire in August, 1851. By warrant under the seal of the Commissioners of Railways this time was extended to August, 1853.

By an indenture dated in March, 1848, the freehold and inheritance in fee simple in two pieces of land in *Westbury* parish, containing about nineteen acres, belonging to two persons named *Rossiter*, as trustees for the Rev. *J. Hooper* and his wife, were conveyed to the *Wilts, Somerset, and Weymouth Railway Company*, together with the mines under and the timber on them, for the sum of £3280, and this sum was to be in full satisfaction for all works for the accommodation of lands adjoining the railway, and for all gates, bridges, fences, &c., and all severance and other damage. The land thus acquired was delineated on the parliamentary plans and book of reference. Shortly after the completion of this purchase (which was made by private agreement, and not under any statutory notice to treat), the company took possession of the lands, and upon part thereof, consisting of about six acres, constructed the *Westbury Station* and certain roads necessary for the accommodation of the traffic. There was a cottage upon part of the land, and this cottage from 1850 to 1875 had been occupied by the company's servants. Two pieces of land, which were marked as Nos. 1 and 2 on a plan, were separated from another piece marked No. 3 on that plan, by a public highway leading from *Westbury* to *Storridge*, and were separated from the Plaintiff's land by a public highway leading from *Westbury* to *Hawkridge*. These highways had been set out under an Inclosure Act award in 1808. On these pieces of land some drainage works

(1) The special case is fully set forth in the report before the Court of Appeal, 3 Q. B. D. 258. The name of the case as it stood in the Court below has been preserved, but the only real Respondents were the Directors of the *Great Western Railway Company*.

H. L. (E.) 1880 HOOPER v. BOURNE.

had been done, and a cesspool had been constructed and a passage for the supply of water made. By an agreement dated the 24th of December, 1849, the *Wilts, Somerset, and Weymouth Railway Company* let the three pieces of land, Nos. 1, 2, and 3, to one *James Bourne* on a tenancy from year to year, and he used them for farming purposes. The agreement contained a provision for the re-entry of the railway company and its agents upon the lands, "for the purposes of the Railway Act, or for any purpose connected with the said railway," upon giving two months' notice in writing. This tenancy of Mr. *Bourne* came to an end.

The railway was completed in 1853. By an agreement, dated 18th of August, 1871, the *Great Western Railway Company* (which had before then, by force of a private Act of Parliament, become entitled to the property as successor to the *Wilts, &c., Company*) let the said three pieces of land to the *Westbury Iron Company* on a tenancy from year to year, such agreement being subsidiary to a license, which, by an indenture dated two days previously (August 16, 1871), the *Great Western Company* had granted to the *Westbury Iron Company* to work the iron ore under the land. The license, dated the 16th of August, 1871, stated that "the railway company being of opinion that the removal of the iron ore from the said first-mentioned pieces of land will not interfere with, or prevent the user of the said pieces of land for the station and siding accommodation and other the purposes of their railway and the works connected therewith, for which the same are now, or are intended to be, used, provided the working and removing the said iron ore be done to the satisfaction of their engineer for the time being, and the holes occasioned by the removal thereof be filled in with slag, and resoiled, as is hereinafter provided, have agreed to grant the iron company the required permission upon the terms and conditions hereinafter contained." The iron company covenanted "throughout the term, as directed by, and to the satisfaction in all respects of, the engineer" of the railway company, to search for the iron ore, to leave such margins as might be required by the company or engineer, to remove the soil in a particular manner, and to preserve the same for the purpose of being again laid thereon, and to the satisfaction of the engineer to make good the slopes, fill up and level all holes, &c. The agreement

contained the following provision:—"In the event of the railway company requiring the whole, or any portion, of the said premises for any purpose whatsoever, they shall be entitled to take possession of the same, and put an end to the tenancy upon giving twenty-eight days' notice in writing, and they may by themselves, their agents, and servants enter upon the said premises without their being deemed trespassers for so doing, or being liable for any damages occasioned thereby." The license contained a like provision.

The *Westbury Iron Company* had occupied the three pieces of land under the license and the agreement, and had worked the iron ore according to their stipulations.

The 14th paragraph of the special case was in these terms: "Since the year 1868 the railway traffic at the *Westbury Station* has much increased, and during that period of time the said three pieces of land have been, and still are, required for the purposes of constructing additional sidings upon them to accommodate the increased traffic. The want of such additional accommodation was, during the period aforesaid, a subject of frequent discussion between the several district officers of the *Great Western Railway Company* having the general supervision of the traffic at the *Westbury Station*, but—in consequence of general instructions from the general manager of the railway company, that, as the company were expending large sums of money upon other works, district officers were not to ask for anything that was not necessary, or could possibly be postponed—no requisition was made by the district officers to the company, during that period, to provide such additional accommodation, nor did the company during that period provide, or take any step to provide, such additional accommodation, and, except as hereinbefore mentioned, the said three pieces of land have during that period remained, and still remain, in the same state as they were up to the end of the year 1868."

The special case stated that "in the year 1863 the Plaintiffs were, and still are, the owners of certain lands which adjoined the portion of the nineteen acres of land upon which the railway and works were constructed."

The case then quoted the 127th section of the 8 & 9 Vict. c. 18, that "with respect to lands acquired by the promoters of the under-

H. L. (E.) 1880 HOOPER v. BOURNE.

taking under the provisions of this or the Special Act, or any Act incorporated therewith, but which shall not be required for the purpose thereof—be it enacted—within ten years of the expiration of the time limited by the Special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands," and apply the money, &c., and "in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in, and become the property of, the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same." The case also referred to the two Acts of the *Great Western Railway Company*, the Act of 1866, s. 6, and the Act of 1868, s. 20, containing similar provisions, then stated the contention of the Plaintiffs and Defendants, and submitted to the Court (which was to have the same liberty as a jury to draw inferences of fact) the question "whether under the circumstances hereinbefore set forth the Plaintiffs are entitled to recover possession of the whole or any part of the said lands claimed by the writ."

The Queen's Bench Division answered that question in the negative, and that answer was confirmed by the Court of Appeal. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Merewether*, Q.C., for the Appellants:—

The Court below has treated land purchased by a railway company under a private agreement, as being in the same position as land obtained under the compulsory clauses of the Railway Acts. The question therefore arises whether a railway company can buy land and hold such land for ever, or whether the holding of land obtained by the company by voluntary purchase, is not restricted, like the other, to the use and purposes of the railway. Then, if mines acquired by the company are not required for the purposes of the railway, are they not to be treated as the surface of the land is, that is, as superfluous? If so, then the provisions of the *Lands Clauses Act* and the *Railway Clauses Act* must be taken to apply to these lands, and the consequence must follow that the lands the subject of this action, having become "superfluous lands," have vested in the Appellants. All purchases of land made by railway

companies must be made with a view to, and for the purposes of, the undertaking, and for them alone. The Legislature never intended railway companies to be the owners of lands except so far as they were necessary for such purposes. And most certainly it was never intended that they should become owners of mines in perpetuity. When it is ascertained that lands are not required for the purposes of the railway, they become by that fact superfluous lands, and must be sold, and if not sold they vest, within a time specified by the statute, in the adjoining owners. The facts here shewed that the lands now in contest were not required for the purposes of the railway. Nineteen acres of land had been purchased, only six acres had been used, and the remaining thirteen acres had been let, first of all, to a person who used them as a farm, and then to a mining company, with power to dig out the iron ore lying under the surface. These acts of the company shewed that the surface of the land itself was not required for the purposes of the railway, and brought this case within the authority of that of *The Great Western Railway Company* v. *May* (1), in which the Lord Chancellor gave the definition of what must be considered superfluous lands. He said (2), adopting the words of the 127th section of the *Lands Clauses Act*, that they were "lands acquired by the promoters of the undertaking but not required for the purposes thereof." That exactly described the lands in this case, the conduct of the directors shewing clearly that they were not so required. There is no such finding here, as in *Betts* v. *The Great Eastern Railway Company* (3), that "the land was purchased solely for the purposes of the railway and had ever since been retained *bonâ fide* for such purposes," and that case, therefore, is inapplicable to the present.

The railway here was originally to be completed in 1851. The time for completing it was extended to 1853. It was then completed, and, from that date, the time began to run in which, if the lands were not used for the purposes of the railway, they must be sold, or they would vest in the adjoining owners. They were not

(1) Law Rep. 7 H. L. 283.

(2) Law Rep. 7 H. L. at p. 292.

(3) Law Rep. 8 Ex. 294; 3 Ex. D. 182. That case came up to this House, where the finding of the jury was treated as conclusive upon the fact, and so no point of law was really determined. See *Weekly Notes*, November 8, 1879. See also on this subject, *London and South-Western Railway Company* v. *Blackmore*, Law Rep. 4 H. L. 610.

H. L. (E.) 1880 HOOPER v. BOURNE.

sold, and there was not a particle of evidence to shew that between 1863 and 1868 they had ever been deemed to be required for the purposes of the railway. The case stated by the arbitrator set forth that from 1868 the increasing traffic of the railway shewed that the lands might be required for railway purposes, but that was a period of five years after the time at which they ought to have been applied to those purposes, or to have been sold. The fact that 1868 was fixed on as the time at which the increasing traffic on the railway begun to raise the presumption that the lands might be wanted for railway purposes shewed that, until that time, there had been no good ground for such a presumption. The natural meaning of the finding in the 14th section of the case was that for five years after the ten years following the completion of the railway, the company had no need nor intention of using the lands for railway purposes. If a man said—I have had some land for five years and now I think of building on it,—he in effect said, that during those five years he had never entertained that intention. It lay on the directors to shew that after 1863 and before 1868 they had intended the land to be used for railway purposes, but they had not shewn anything of the kind, and the 14th paragraph distinctly pointed to an opposite conclusion. It was not enough for them now to say that after 1868 circumstances had suggested that the lands might be wanted for the purposes of the railway.

Then as to the mines (1).

Mr. *Davey*, Q.C., Mr. *Arthur Charles*, Q.C. (Mr. *Fletcher Moulton* was with them), for the Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, several questions have been argued in this case by the learned counsel who have presented the case to your Lord-

(1) The questions whether the Appellants had made out a title as adjoining owners, and what were the rights which a railway company might acquire and exercise in the purchase of mines, were discussed by the Appellants' counsel, and on the latter point the *Great Western Railway Company* v. *Bennett* (Law Rep. 2 H. L. 27) was referred to; but the judgment was confined to the questions whether the lands were superfluous lands, and whether the Appellants had made out any title to recover them.

ships on behalf of the Appellants, but it will not, in the view which I take of the case, be necessary to refer to more than one of those questions. If it turns out that the land which is here sought to be recovered is not "superfluous land" within the meaning of the *Lands Clauses Consolidation Act*, the other questions which have been argued in the case become immaterial.

My Lords, the action is brought in the year 1875 to recover against the *Great Western Railway Company* certain closes of land, three in number, which are alleged to be superfluous land. The Plaintiffs (the Appellants), who seek to recover the land, allege that they are, and for the purpose of the present argument (and for that purpose only) I will assume that they are, the "adjoining owners" who would be entitled to recover the land, if it be superfluous land. The case of the Plaintiffs, therefore, is one in which they seek to establish, I will not say a forfeiture of the land, but, at all events, that the land has been divested out of the railway company in which undoubtedly it was vested, and has become vested in the Plaintiffs. The case of the Plaintiffs must be that this divesting from the railway company and vesting in the Plaintiffs took place in the year 1863. The case, my Lords, therefore, is one in which the Plaintiffs have to recover upon their own title, and they have to shew, affirmatively, that, as a matter of fact, the land in question had become at the date which I have mentioned superfluous land; and, until they establish that fact, they do not advance their case. The mere circumstance that at one particular period the land was unbuilt upon, or unused for the purposes of the railway, will not be material, at all events will not be conclusive. It must be shewn affirmatively that, within the meaning of the Act of Parliament, it had become at the date I have mentioned superfluous land, that is to say, "land not required for the purpose of the railway company's undertaking."

The case did not go before a jury and therefore there is no finding of a jury on the subject. By the agreement of the parties a special case was stated, and the Court was at liberty, by the agreement of the parties, to draw inferences on the question of fact from the statements made in the special case. I will refer your Lordships to one of those statements, the statement in paragraph 14 :—[His Lordship read it, see *ante*, p. 5]. Your Lordships

H. L. (E.) 1880 HOOPER v. BOURNE. Earl Cairns, L.C.

have this statement positively made,—it is common ground therefore, between the parties in the case,—that, since the year 1868, these pieces of land have been, and still are, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic. There is no doubt therefore as to what was the case in 1868.

Upon that, the first observation I make is this, that if the question had been presented for solution before a jury, or any other tribunal of fact, in the year 1863, it is quite possible that a controversy might have arisen as to whether in the development of the traffic of the company these lands would be required for these additional sidings, and at that time, perhaps, there would not have been a possibility of predicating what was predicated in the year 1868, that the increase of traffic necessitating these additional works had actually taken place. That may be so; but there is a very strong presumption which arises when you find that in 1868, without its being said that there was any unexpected, unnatural, casual, or fortuitous development of traffic, but merely that the traffic had developed so as to require this additional siding accommodation,—there is, I say, the strongest presumption that those elements were at work in the year 1863, and that any person with proper foresight, properly acquainted with the way in which railway traffic does develope, would have said, and would have said rightly, in the year 1863 that these pieces of ground would be required for the development of the traffic which afterwards took place. As your Lordships well know, it is not at all necessary that at the end of the ten years there should have been then the immediate possibility of employing, or the immediate necessity for employing, the pieces of land for the additional work. It would not have been superfluous land if it could have been reasonably said at the end of the ten years, that there was a purpose for which, even after that period, it would be required in connection with the railway. That is the first observation.

But a second observation is this; these pieces of land were not pieces of land adjacent to, or in the neighbourhood of, a railway in some wild and unpopulated part of the country, but they were three pieces of land immediately contiguous to a station, which itself was a station of a populous town. Therefore without any

evidence on the subject, without any statement in the special case, your Lordships, or any tribunal taking notice of facts which are notorious, and within the knowledge of every person, would naturally conclude that there was a strong presumption that land taken by the railway company immediately around its station, near a populous town, was land as to which there was strong probability at all events that it would be required for the purposes of an extension of the station accommodation of that place.

My Lords, that is a second circumstance; but there is a third. Your Lordships find that in the documents which have dealt with this land for temporary purposes, a document for example which leased it to the first person who was in occupation of it, a person of the name of *Bourne*, and the documents which afterwards dealt with it (although the latter are documents dated after the expiration of the ten years),—in all those documents the directors of the railway in speaking of the land, speak of it always as land as to which there was the probability that it might at any time, and at very short notice, be required for the purposes of the railway, and take care while putting the land into the occupation of other persons, to reserve to themselves the power of reclaiming it upon short notice for the purposes of their railway undertaking.

Now, my Lords, bearing in mind that it is, as I have already said, for the Plaintiffs to establish their case, and to shew that at the end of the ten years the land was superfluous land, I take leave in the first place to say that they have not shewn that fact by any affirmative evidence of their own, and that, on the other hand, the positive statement in the Case to which I have referred—a statement no doubt relating to 1868, but reflecting back upon the year 1863—and the other considerations which I have mentioned, go in my mind very far indeed to shew, even if the *onus* had been upon the railway company, that this land was not superfluous land or land not required for the purposes of their undertaking. Therefore, my Lords, so far from differing from the conclusion arrived at by the Court of Queen's Bench, the tribunal which the parties selected for the purpose of determining in the first instance this question of fact, I am bound to say for myself that had the case been presented to me in the first instance, I should have

H. L. (E.) 1880 HOOPER v. BOURNE. Earl Cairns, L.C.

arrived at the same conclusion. I understand that in the Court of Appeal all the Judges did arrive at the same conclusion, some of them no doubt expressing their opinions more strongly than others, and I see no reason to differ from any of those opinions.

My Lords, I will only say one word on the subject of the mines. It was attempted by Mr. *Benjamin* to make a distinction between the mines or minerals under these closes of land and the surface of the closes themselves. Now the facts of the case as to that are simply these. The minerals were bought by the railway company along with the lands. I asked this question in the course of the argument;—if a railway company buys a close of land with the minerals under it, and if it afterwards turns out that the surface of the close itself is required for the purposes of the railway, but that those purposes could be answered without preserving to the surface the mineral support in the usual way, is there any authority that the railway company is bound to sell the minerals apart from the surface, and that in default of being so sold, the minerals would vest in the adjacent owners. I could not learn that there was any authority for that proposition. But whether that be so or not, that is not simply the case here, because it is perfectly apparent here, from the documents which form part of the case, that the opinion of the railway directors was that, although it would be safe, and would be consistent with the purpose for which these closes were wanted, that some portion of the minerals under them might be taken away, the agreement by which permission was given for this to be done, reserved to themselves, through their engineer, the control of the manner and the form in which, and the extent to which, these minerals should be taken away. They therefore reserved the power and the authority to regulate the extent to which the support of the minerals should be taken from the land in a way that they could not have done if they had sold the minerals absolutely apart from the surface.

My Lords, I therefore think it is impossible here to make any distinction between that part of these closes which was subjacent, consisting of minerals, and that part of the closes which was merely surface land.

On the whole I submit to your Lordships that there is no ground for dissenting from the judgment of the Court below, and

I will move your Lordships that the appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I am of the same opinion, and so entirely for the same reasons that I do not think it necessary to detain your Lordships by expressing my view on this case at any length.

It appears to me that the plain object of the Legislature in these clauses that have been commented upon, in reference to these superfluous lands, has been this. It is a very high act of authority, and one only to be justified by the public advantage which is thereby secured, to insist on a landowner selling his property and parting with his estate for the purpose of having a railroad made over it, which is to be in itself such a public benefit as is supposed to justify the interference with his rights. The Legislature conceiving, and in my view rightly conceiving, that to be a matter in which the greatest moderation should be used with reference to the interests of all parties concerned, has provided that companies making these works shall not, under pretence of the benefit they are about to confer on the public, acquire to themselves property which can be dealt with in any other way than for that specific public purpose for which alone they were authorized to take it. Therefore clauses have been introduced into the general Acts, by which, the time for the execution of the works being limited, the company is bound within a period of ten years after that time to sell all that land which it does not want; or, in default of selling it, and to induce the companies to sell it, clauses are put in with reference to (it cannot properly be called a reverter) the handing over of the lands to the adjacent owners. Who are the adjacent owners it is not necessary to decide in the present case.

That being so, my Lords, it appears to me that the cases, which have been numerous in various shapes, as to superflous lands, have simply proceeded at all times on the *bona fides* of the transaction; and the question is therefore always peculiarly a subject for consideration by a jury. There have been cases in Chancery where injunctions have been applied for before the land was taken, on the ground that it was impossible that the land could be required, or that notice had been given to take a much greater quantity of

H. L. (E.) 1880 HOOPER v. BOURNE. Lord Hatherley.

land than could be required for the purposes of the railway. That is a much more difficult case than the case which arises afterwards when the works have been executed. But the question having arisen in different forms it all comes round to this result, whether or not the companies are proceeding *bonâ fide*, and whether or not the land is actually wanted for the execution of the undertaking which they have in hand.

Now, my Lords, what do we find in this case? We find a fact upon which my noble and learned friend on the woolsack has observed. But before coming to that, I will add, that where the directors, having entered into a contract, have acquired land, and there is no suggestion of *mala fides*, and there appears to be no reason in the world why they should have attempted to take the land, except for the particular business they had in hand, they have been held entitled to retain it. They would, naturally, not be desirous of taking more land than they wanted if they were acting *bonâ fide*. But besides that, as my noble and learned friend has said, you have it found by the special case, which is equivalent here to a verdict, the Judges being empowered to draw such inferences of fact as they may think warranted by that statement of facts, that after the making of the railway and in the period between the expiration of the ten years and the taking of the present proceedings, the land, in consequence of the development of traffic, has become necessary and is now necessary for the purposes of the undertaking. There appears to be no direct evidence on the subject, but that is the finding. That seems to me to answer the question at once, because, as I took the liberty of saying to Mr. *Benjamin* during the course of his argument, it seemed to me that his argument throughout assumed that, though, when the Plaintiffs in the present case took their proceedings, they had found the land in question covered with railroads and tramroads crossing each other for the purposes of a station, and had found it in daily use for sidings, and had found a largely increased traffic coming into the station, they would nevertheless, because of the mere lapse of time, have been entitled to say that the land was superfluous, in the face of the very strong inference that must arise from the fact of its being largely used and beneficially used at the then present time. A strong inference would

arise in such a case that it was land that was required for the purposes of the undertaking, because all traffic admits of development, and the purpose for which this land had been acquired having been, at all events as regards part of it, to use it for the purpose of a railway, you find the whole of it at the moment of the dispute arising in the case I am supposing, so covered with a network of railways as to be assisting the growth of that traffic, and assisting it profitably and beneficially to the company, and the public. Yet according to Mr. *Benjamin's* argument you are to say, All that is to come to an end, because, although I did not choose to stir ten years ago, ten years ago I might have stirred, and if I had stirred ten years ago, you would not have been in a condition to say what you now can say, that it was then wanted for the development of your traffic. The fair inference is that it was wanted from the first, unless you can shew that this development was something preternatural, and not a mere ordinary development of railway traffic. Of course, cases of that kind might be conceived. All that would have a bearing upon the subject I first mentioned, namely, the *bona fides* of the company in taking this land. A very strong inference is to be drawn from the facts stated in the case that it was from the first intended for that object which it appears during this long period from 1863 has been attained by it.

My Lords, it also appears to me that, so far from the various instruments and deeds which have been executed affording any inference that there was a *mala fides* in this transaction, or that the company did not want this land to develop the traffic, every one of them seems to have a contrary bearing. There is always a power reserved for determining the arrangements which have been entered into; and what could that be for, except because the directors say, "We think we shall or may want the land, and if we do want it we may take it again, else we should not put in any such stipulation." In a case of this description, where there is so much that may be considered conjectural, and where the work has first to be executed, you must leave a considerable margin to the judgment of those who undertake the work as to what would be the best mode of developing it, and how much, when it is so developed, they may want for the development.

H. L. (E.)
1880
HOOPER
v.
BOURNE.
Lord Hatherley.

That being so, I really think we have here everything to justify the inference which the learned Judges in the Court below have unanimously drawn from the facts now apparent on the case before us, and the conclusion is not one which admits of dispute, unless some question could be raised upon that subject on which Mr. *Benjamin* laid great stress to-day in his argument, namely, the question of mines as distinguished from other parts of the property. The finding in the 14th paragraph of the special case is one which seems to me in fact to carry, to its full extent, the justice of the inference that has been drawn by those learned Judges. For the reasons already assigned by my noble and learned friend, the Lord Chancellor, which I have scarcely done more than repeat for my own satisfaction, as I have wished to state some of the reasons which occurred to me as supporting the decision the learned Judges have arrived at, I think it was a right decision. In the first place, the inference they have drawn is, in my opinion, only a just inference from the statement of the case in the 14th paragraph, and from the dealings of the railway company in reference to this property. It is true they have not built over it, and it is not found to be in a state of utility at present; but the whole argument we have heard to-day might have been justly urged to the same extent and the same degree if it had been found to have been covered with works at the time when this action was brought. That was not the case; but I think there is nothing whatever to authorize a suspicion or a doubt that that which has been done from the year 1868 down to the present time has been a reasonable development of the original purpose of the railway company, and that this was during the intervening time (including the year 1863) a purpose which at some distant time might be carried into effect, and which it seems has been carried into effect during the period referred to in the 14th paragraph.

The learned Judges have relied upon that in coming to the conclusion they have come to, that this land cannot be held to be superfluous land. I think that the proof of its being superfluous really lies on the Plaintiffs. They have no title whatever, and can pretend to no title whatever, unless the land be superfluous, and therefore, in the face of the total absence of any evidence on their part that it was superfluous from 1863 to 1868, with the

finding that from 1868 it never has been superfluous, and there always has been an intention to use it, I think that there is made out a very strong ground for thinking that the railway company really wanted it from the first. There is not a tittle of evidence on the part of the Plaintiffs to shew that it is superfluous land, beyond the mere fact that the railway directors have never executed works upon it. But I must assume that it is still within the competency of the railway company to carry such works into effect, in order to fulfil the statement of facts in the 14th paragraph, namely, that it has been from 1868, and is now, land that is not superfluous. There is not any evidence, therefore, before us to the contrary, which ought to lead us to depart from that view or from the just inference to be drawn from that statement, namely, that what was wanted after 1868 was wanted at a period earlier than that, because clearly, in the purview of the parties undertaking the work there was in this, as there is in every railway case, a notion of a development of traffic which alone induces parties to enter into these undertakings at all. That development of traffic has in fact taken place: and this being, and having been from that time (1868) downwards, land which is not superfluous, I do not see what single point I can put my finger upon in the Plaintiffs' case to justify me in coming to a contrary conclusion from the views which have been taken by the other learned Judges who have considered the subject.

LORD O'HAGAN:—

My Lords, I concur with Lord Justice *Bramwell* in thinking that this is an action "which ought not to have been brought" (1), and I see no sufficient reason for dissenting from the unanimous opinion of the Judges of the Court of Queen's Bench and of the Court of Appeal, in favour of the Defendants.

Reaching the conclusion, in common I believe with all your Lordships, that the land which is the subject of dispute cannot, upon the evidence, be held to have been "superfluous" at the end of the ten years, I do not deem it necessary to discuss the questions which have been raised as to adjacent ownership, and the conveyances of mines and minerals.

(1) 3 Q. B. D. at p. 272.

H. L. (E.)
1880
HOOPER
v.
BOURNE.
Lord O'Hagan.

It seems to me that, on the 3rd of August, 1863, the day to which, according to the decision of this House in *The Great Western Railway Company* v. *May* (1) our attention should be directed,—the land which the Plaintiff claims might reasonably have been dealt with, on an examination of the state of the railway, and a fair estimate of its capabilities of development, and the works which the profitable use of them might involve, as "required" for the purposes of the Act within the meaning of the 127th section.

I cannot adopt the view which was somewhat pressed in the argument, that an actual present intention to employ the land for those purposes must have been formed by the company within the prescribed time, to prevent a forfeiture at the end of it. I think it is enough, if, though no such intention was consciously formed or explicitly formulated, the circumstances of the railway indicated a probable development, and a requirement of farther accommodation within an ascertainable and reasonable period. If the want of an express intention to undertake a specific work in the month of August, 1863, forfeited the interest of the company and transferred it to the adjoining occupier, the latter might have lain by, as he has done, for a long series of years, the company might have gone on with large and expensive works, and he would have been entitled to come in after their completion and secure them as his own. This would not be just or reasonable: and nothing in the statute compels us to such a conclusion. I adopt the words of Lord Justice *Brett* as expressive of the view I have taken of the statute. "In my opinion," he says, (2) "the real meaning is, can the tribunal which has to try the case say, at the time when the case is tried, that if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said, at that time, that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purpose of the railway within a reasonable time?" And this I repeat, although at that period there was no present, definite, or formal resolution so to apply them.

The question before the Queen's Bench was one of fact. The

(1) Law Rep. 7 H. L. 283. (2) 3 Q. B. D. at p. 282.

Judges had the same powers of drawing inferences as a jury would have had. They exercised that power, and found that in August, 1863, the land in controversy was required for the purposes of the railway, although it had not then been dedicated to them. I need not repeat the reasons which have seemed to my noble and learned friends, and seem to me, to make this finding satisfactory. The burden of proof, as has been said, is on the Plaintiffs. They seek to work a forfeiture and to disturb a possession, and they are bound to establish that the land they seek to appropriate is "superfluous land" not required for the purposes of the Act. They have failed to do so. During the great lapse of time since the railway was completed, the company has not utilised the land, and this has been fairly urged as leading to the inference that, not having been used, it cannot be said to have been "required." If the action had been brought immediately after the expiration of the ten years, it might have been more difficult to answer that argument.

When a company purchases land, after full consideration, on the advice of competent engineers, and with ample information as to its probable requirements, it may be fairly, in the first instance, presumed to have taken only what its real interests compelled it to take. The Legislature, for very good reasons, has fixed a period within which the correctness of its judgment in this respect may be tested, and at the end of the ten years any such presumption is done away, and the lands not then "required" are to be sold or to go to the adjoining owners. A new presumption then arises on which the Appellants might properly rely, but in the case before us this is encountered by positive evidence of a very persuasive kind. It has been found by the Special Case (paragraph 14, *ante*, p. 5), first, that since the year 1868 the railway traffic has much increased; secondly, that, during that period of time, the three pieces of land have been required for the purpose of constructing additional sidings upon them to accommodate the increased traffic; and, thirdly, that they are still required for that purpose. Is it reasonable to say that if the land was "required" in 1868, and is still "required," it was not so "required" in 1863? Railway traffic does not increase largely in a day or a year, and skilled persons can foresee and determine beforehand the changes

H. L. (E.) 1880 HOOPER v. BOURNE. Lord O'Hagan.

of accommodation which its increase may probably necessitate. Can we suppose, looking back at the state of things in 1863 with the light reflected from 1868, that the managers of the railway company did not anticipate some changes like those which so soon after made the land essential to the line? Or, whether they did or did not so anticipate, can we suppose that, in fact, the necessity, although only to become real in the near future, would not have been held by any official of competent experience, knowing the condition of things, to have then had potential existence? We are not bound to look only to the case which might have been made on either side if the action had been brought earlier. We have facts established from which it may be inferred that in 1863 the land was "required," as it was in 1868 and has been ever since; and that all who were conversant with the affairs and the prospects of the railway must, or might, have known it to be so.

The inactivity of the directors since 1868 has fairly been relied on; and, if there were any question as to their *bona fides*—a consideration, as has been observed by my noble and learned friend (Lord *Hatherley*), of great importance in cases of this kind—it would have had material claims to our attention. But the special case explains the delay in providing the additional accommodation, shewing that it was the subject of frequent discussion amongst the officers of the company, and that it was not supplied because of pecuniary complications created by a large expenditure upon other works.

The lettings for agricultural and farming purposes can scarcely be used adversely to the Respondents, as the leases all contain provisions for the resumption of possession by the company upon short notice, and are, therefore, rather evidence of a continuous purpose to use the grounds demised, for railway purposes.

On the whole I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

In this case the railway directors had purchased a plot of land about nineteen acres in extent with the minerals under it, and on that plot of land they might construct works for the purposes of the undertaking; but ten years after the time limited for making

the works, that is to say, on the 10th of August, 1863, such lands as they then held as were not required for the purposes of the undertaking, were to vest in the owners of the adjoining lands. Now when that time, the 10th of August, 1863, arrived, the railway company had erected a station upon the spot, and had made the railway and made some works, which together occupied about six acres out of the nineteen. Between twelve and thirteen acres of the land which was purchased there, were not yet used for any purpose of the railway, and the question comes to be, was it land which was no longer required for the purposes of the undertaking? or, in the other phrase which is used in the Act of Parliament, was it superfluous land? That was a question of fact at that time.

One can see that there are several things to be considered upon that. First of all, there is no doubt that the fact that the lands had not been used, although more than ten years had elapsed since the time when they were purchased, was evidence to suggest the conclusion that they were not required. There is also no doubt that inasmuch as we all know that a station is peculiarly a place where the extent of land that may be required for buildings, and for sidings, and for other things, is likely to increase with the traffic, the fact that this land was adjoining to a station was a reason for saying that it was very likely that the land might be wanted for the purposes of the railway, although if the same plot of land had been situated elsewhere alongside the railway, very far from a station, it would be hardly conceivable that it ever should be required at all for the purposes of the undertaking. That was also a question to be considered.

But all these matters had to be considered, as they appeared on the evidence at a later time, by the tribunal which had to decide the fact. I quite agree that the fact to be decided was, were these superfluous lands on the 10th of August, 1863? But that was to be decided upon the evidence produced before the arbitrator who was settling the case, and that was in the year 1878. Fifteen years had elapsed, during which many things had happened, and many things had become clear which would not have been clear, but would have been speculation in 1863. Had the action been brought and the matter required to be decided in the year 1863, the railway company must have called witnesses to

H. L. (E.) 1880 HOOPER v. BOURNE. Lord Blackburn.

say, "We expect that the traffic will increase, we expect that this will happen, or that that will happen." But, in fact, the question came to be decided in 1878, when fifteen years had elapsed, when new things had happened; and some of these things are things which make in favour of its being superfluous land, and some make against it. I may say that the fact that fifteen years more had elapsed during which the land was not used for buildings or for sidings, is strong evidence,—as strong as any the Plaintiffs had,—that it was superfluous land.

On the other hand, there was also a minor thing with regard to the minerals during these fifteen years. Beginning in 1871, the directors had utilised the land for the purpose of working out the minerals underneath it. They had sold the minerals to a company to work them out upon the terms which were alluded to by my noble and learned friend the Lord Chancellor, and which I shall not repeat. If it can be supposed that that was evidence which led those who had to draw the inference of fact, to the conclusion that the land was kept for the purpose of working mines, and not *bonâ fide* for the purposes of the undertaking, that would be evidence that they were superfluous lands. I can only say, for my own part, I do not think there is the least ground for saying that it was kept for the purpose of working minerals. I think the company kept the land under the belief, whether rightly or wrongly, that it would be used at a future time for the purposes of the undertaking, and the directors thought only to get what could be got from the minerals in the meantime, and I do not see that they are in the slightest degree to blame for that.

Then, on the other hand, comes what is to be said for the defence, upon which I not only so far agree with the Court below that I cannot disturb the finding, but I must say that I should have come myself, independently, to the same finding. I think when that is shewn, which has been proved, namely, that in 1868 and from 1868 down to 1878 the state of things existed which is mentioned in paragraph 14 of the Case stated by the arbitrator, and which in substance amounts to this: that during these last ten years it has been ascertained as a fact, and I, the arbitrator stating the case find as a fact, that, although the lands are not now used, it is quite certain they will be wanted at some reasonable time for the purposes of the undertaking—when that is found with

regard to 1868, I think it throws very great light indeed upon what took place in 1863. It may be that the evidence in 1863 would not have convinced a jury of what the evidence in 1878 did convince the arbitrator, but when you find that during the last ten years it has been quite ascertained that the lands were wanted, I think it is very reasonable to draw the inference that in the five years from 1863 to 1868 they were so wanted too, unless the contrary is shewn. I do not say that it is conclusive, but I say it is reasonable to draw that inference.

For myself I confess I should be inclined to go so far as to say, without hesitation (though Mr. *Benjamin* thought it would be a monstrous conclusion), that wherever it is shewn that lands have not been actually claimed by adjoining owners until some years after the time when they might have been claimed as superfluous, but still remain in the hands of a railway company, and they are required for the purposes of the railway at the time when they are claimed, it is a reasonable conclusion that the *onus* of proof is shifted to the other side. No doubt in such a case the adjoining owners claiming the land may be allowed to prove that which generally they will find it very difficult to do, namely, that it was not wanted at the time when the ten years began. It is not necessary, however, to go so far as that in the present case. I think, in the absence of evidence to the contrary, since it is shewn that in 1868 the lands were required, it is a reasonable inference that they were required in 1863 also.

My Lords, I will only add one word as to the minerals. The railway directors did here what they were not bound to do. They might have bought the land, leaving the minerals severed from it in the hands of the vendor. They agreed (it matters not why) as they might do, to purchase the lands and the minerals together, so that the lands were not severed from the minerals. I see Lord Justice *Bramwell* says (1) that he thinks even if the surface was not required for the purpose of the railway, and therefore was superfluous land, some sort of severance may be made so that the Defendants may keep the minerals, although the surface of the land may have to be returned to the owners of the adjoining lands. That is not the case before the House, and it is not necessary to decide anything with respect to it, but I must say that I should

(1) 3 Q. B. D. at p. 278.

H. L. (E.) 1880 HOOPER v. BOURNE. Lord Blackburn.

pause very long before I came to that conclusion. I doubt it very much.

The real question here is the converse of that; it is the question raised by Mr. *Benjamin* in his argument. He says, even if it be established (as for the reasons I have given I think it is established) that the surface was required for the purpose of the railway company's undertaking, you are to say you will sever the minerals below from it, and that they must be sold, and that they vest in the owners of the adjoining land. That would be, I think, a very inconvenient result, and I certainly can see nothing whatever in the sections which were quoted by Mr. *Benjamin* from the *Railways Clauses Act*, to point to any such conclusion as that. What is there said is, that companies need not buy the minerals until they find that it would be dangerous to the undertaking if they do not buy them, and then they may buy them, but there is nothing whatever said to the effect that they shall not buy them before; still less it is said that if there be any minerals in the land which belongs to companies, which they have actually bought, they must sell those minerals independently, whatever mischief it may do to their undertaking. I confess I cannot see any reason for making such an enactment, and Mr. *Benjamin* did not succeed in pointing to anything in the Act of Parliament which seemed to me to amount to that. I believe I am not wrong in saying that there is no case in which there is a decision or *dictum* of authority pointing that way; certainly I think the case of *The Great Western Railway Company* v. *Bennett* (1) in this House does not point that way.

Therefore, my Lords, as I have said, I think the fact was rightly found below, and that being quite enough to decide this question, I do not think it necessary to give an opinion on any of the other points which have been urged.

Judgment appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, 9th February, 1880.

Solicitors for Appellants: *Field, Roscoe, Field, Francis & Osbaldeston.*

Solicitor for Respondents: *R. R. Nelson.*

(1) Law Rep. 2 H. L. 27.

[HOUSE OF LORDS.]

LIVINGSTONE . . . . . APPELLANT;
THE RAWYARDS COAL COMPANY . . RESPONDENTS.

H. L. (Sc.)
1880
Feb. 13.

Coal Mine worked by Mistake beyond Boundary—Compensation—Evidence of the Measure of Damage—Royalty—Surface Damage—Way-leave.

A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When *A.* purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to *B.* and *C.* They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under *A.*'s acre and a half; and in doing so damaged the surface.

A. could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but to *B.* and *C.*; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent.

In a claim by *A.* for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:—

Held, affirming the decision of the Court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by *B.* and *C.* for the surrounding coal field; therefore *A.* was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface.

Held, also, that as the question of "way-leave" was not argued before the First Division of the Court of Session, it could not be entertained in this House.

The principle of *Jegon* v. *Vivian* (Law Rep. 6 Ch. 742) sustained.

APPEAL from the First Division of the Court of Session in *Scotland.*

In 1837 Mr. *Gavin Black*, then proprietor of the lands of *Rawyards*, near *Airdrie, Lanarkshire*, feued out a small portion of land, namely, 1 acre 30 falls and 21 ells, to the *Monkland Iron and Steel Company*. By the feu disposition the grantor specially

H. L. (Sc.) 1880

LIVINGSTONE v. RAWYARDS COAL COMPANY.

reserved to himself, his heirs and successors, the whole ironstone in the ground feued; but the deed contained no reservation of coal.

In 1869 the Appellant, Mr. *James Livingstone*, purchased the feu, and some thirty miners' cottages, which covered the surface, for £80, from the *Monkland Iron and Steel Company*. The Appellant appears to have been under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved by the superior.

In 1871 Mr. *Gavin Black* died, and was succeeded by Mr. *John Motherwell*, the present proprietor of the lands of *Rawyards*. He, in the belief that all the coal on the estate had been reserved, granted in 1872 a lease of the whole property in the coal—as far as this appeal is concerned—to the Respondents, the *Rawyards Coal Company*, at a royalty of 6*d*. per ton. They, just as the Appellant was ignorant of his rights, were ignorant of theirs; for they believed they were the owners of all the coal, including the coal under the Appellant's feu. Accordingly, in the ordinary course of their working, and between May, 1871, and May, 1876, they wrought out and removed the coal under the Appellant's acre and a half, to the amount of 5895 tons. When this was done, and the coal disposed of, it was discovered what the real titles were, through the Appellant examining his titles for the prosecution of a claim for surface damage; for the Respondents in working under the acre and a half had, by letting down the ground, caused damage to the miners' cottages. The question under these circumstances came to be, what was the measure of damages the Appellant was entitled to. It was admitted that what was done, was done in perfect ignorance, and that there was no bad faith, nor sinister intention on the part of the Respondents. The Appellant in his action claimed (1) the value of the coal, under the deduction of proper allowances for raising the same; (2) a sum for way-leave, in respect that large quantities of coal had been carried from the adjacent coal field through the Appellant's feu; (3) damages done to the miners' cottages. The Respondents, admitting they had taken the Appellant's coal, tendered in discharge of the action £450 10*s*. This offer being

refused by the Appellant, the Lord Ordinary (1), after a proof, found, June 10, 1878, *inter alia*,

"That the coal removed from the Pursuer's (Appellant's) feu by the Defenders (Respondents) consisted of 4300 tons or thereby of free (or common) coal, 1275 or thereby of dross, and 320 tons or thereby of gas coal, in all 5895 tons or thereby; and the value of these at the pithead, according to a reasonable calculation of the market value, was as follows: common coal, at 6*s.* per ton, £1290; dross, at 1*s.* 6*d.* per ton, £95 12*s.* 6*d.*; and gas coal, at £1 3*s.* 11*d.* per ton, £382 13*s.* 4*d.*; thus amounting in all to £1768 5 10

"(5) That a fair price for working the said coal may reasonably be fixed at 4*s.* 3*d.* per ton over head, this sum including everything except lordship and capital charges, the amount at this rate being in the aggregate 1252 13 9

"And leaving as free profit or value in the hands of the Defenders, derived from coal belonging to the Pursuer, the sum of £515 12 1

"In the second place that the Pursuer is entitled to recover the said sum of £515 12*s.* 1*d.* from the Defenders: finds Pursuer entitled to the expenses of process, &c."

The Lord Ordinary disallowed the Appellant's claim for damage to his houses by subsidence of the surface, holding that was a loss which the Appellant must necessarily have incurred had he himself worked out the coal. The Lord Ordinary also rejected the claim by the Appellant for "way-leave," amounting to £33 6*s.* 8*d.*, calculated at the rate of about 2*d.* per ton; and the Appellant's claim for £110 9*s.* 8*d.*, as the amount alleged to have been saved to the Respondents by working through, instead of round the Appellant's feu. And these claims were not mentioned by the Appellant's counsel when the case was argued before the First Division. The Respondents being of opinion that the Lord Ordinary had misapprehended the nature of their contention, and had greatly underrated the expense of working the coal, presented a reclaiming note against his decision. The First Division, on the 20th of May, 1879, reversing the Lord Ordinary's interlocutor, found that the Appellant was entitled to £171 7*s.* 6*d.*, being the amount of lordship on the coal excavated, calculated at the rate paid by the Respondents to the superior for the surrounding coal field, with, in addition, a further sum of £200 as

(1) Lord *Craighill*.

H. L. (Sc.) 1880 LIVINGSTONE v. RAWYARDS COAL COMPANY.

compensation for damage done to the houses on the surface. In respect of the tender their Lordships gave the Respondents their costs from the date of the said tender (1).

Mr. *Davey*, Q.C., and Mr. *Guthrie Smith*, for the Appellant, contended that he was entitled to the value of the coal after deduction of the cost of severance and bringing it to the surface. Here the value of the coal was the free profit made by the Respondents. The Appellant was content with the Lord Ordinary's finding; but the judgment of the First Division was in effect to compel the real owner of the coal to receive a royalty, giving the whole profit made to the trespassers. That finding was not consistent with the principle of *Jegon* v. *Vivian* (2) and the earlier cases. Where the coal is taken by fraud or negligence, the proper estimate of damage is the value of the coal when gotten, without deducting the expense of getting it: *Martin* v. *Porter* (3), *Wild* v. *Holt* (4), and *Phillips* v. *Homfray* (5). But where taken by mistake, and an encroachment under title, a milder rule prevails, though in *Morgan* v. *Powell* (6) the Defendant was not allowed the cost of the severance of the coal. So in *Wood* v. *Morewood* (7), a case at *Nisi Prius*, *Parke*, B., told the jury that if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he had, they might give the fair value of the coals as if the coal field had been purchased from the Plaintiff. The jury found that there was no fraud, and estimated the damages accordingly. That case was the precedent for the principle on which *Jegon* v. *Vivian* (2) was decided: see also *Hilton* v. *Woods* (8), remarks of *Malins*, V.C. (9); *In re United Merthyr Collieries Company* (10).

The value of the coal taken was the profit admittedly gained by the Respondents, but the Court below thought the question of

(1) Court of Sess. Cas. 4th Series, vol. vi. p. 922; Scotch Law Rep. vol. xvi. p. 530.
(2) Law Rep. 6 Ch. 742.
(3) 5 M. & W. 351.
(4) 9 M. & W. 672.
(5) Law Rep. 6 Ch. 770.
(6) 3 Q. B. 278.
(7) Ibid. 440, n.
(8) Law Rep. 4 Eq. 432.
(9) Ibid. at p. 440.
(10) Ibid. 15 Eq. 46.

the profit realized by the trespasser not of the least relevancy. If that judgment is right then the real owner would be wrong in claiming his own coal lying at the pit's mouth, for it would be a sufficient answer for the trespasser to tender the lordship. The fact ought to weigh that the Appellant did not want the coal removed, on the contrary it was of great value to him having a firm foundation in a county so honeycombed as *Lanarkshire.*

[LORD BLACKBURN:—The Court below decided this case on the peculiar circumstances that no one could work this coal at a profit unless he had the facilities of the Respondents.]

It was no answer that the Appellant could not have worked the coal himself. He was entitled to have the chattel taken, restored, or, if that was impossible, then the profit made out of it must be handed over to him.

The Appellant was satisfied with the amount awarded by the Court below for surface damage, but submitted he was also entitled to the clear profit made out of the coal.

They further maintained that a sum should be allowed the Appellant for "way-leave," or for the advantage reaped by the Respondents by working their tramways through, instead of round the feu.

[EARL CAIRNS:—That question was not argued before the Inner House, and it is not usual to argue points in this House that have not been argued before the Court below.]

On the whole matter they submitted that the Appellant was entitled to the profit made, and to costs.

Mr. *E. E. Kay,* Q.C., and Mr. *Gloag,* maintained for the Respondents—putting aside the compensation for surface damage—that all the Appellant was entitled to was the value of the coal *in situ;* that principle was laid down in both *Wood* v. *Morewood* (1) and *Jegon* v. *Vivian* (2). The question was not what the trespasser made of the coal, but what the owner *could* have made of it. The Appellant had no right to follow the coal; nor was the profit made on it by the Respondents any test of its value

(1) 3 Q. B. 440, n. (2) Law Rep. 6 Ch. 742.

H. L. (Sc.) 1880

LIVINGSTONE v. RAWYARDS COAL COMPANY.

in situ. The circumstances here were most peculiar,—the Appellant could not sink a shaft and work the coal himself at a profit; nor was there a single person he could sell the right of working it to, except the Respondents; and the Appellant's own surveyor advised him to take the ordinary royalty given for the coal in the neighbourhood. Therefore the value of the coal to the Appellant was accurately given by the Court of Session, and the principle of the cases cited had been applied.

Mr. *Guthrie Smith,* in reply.

EARL CAIRNS, L.C.:—

My Lords, there are two minor points in this appeal which I may mention in the first place, for the purpose of putting them on one side. I mean the question of an allowance for way-leave, and the question of an allowance for what is termed the advantage obtained by working through, instead of round, the feu of the Appellant. Both those points were insisted upon before the Lord Ordinary; but when the matter came before the First Division, the contest of the Appellant with regard to those points does not appear to have been renewed; and, therefore, to enter upon them now would be in substance to entertain in this House an appeal from the Lord Ordinary, and not from the First Division.

Upon the main question which has been argued the case is one of some peculiarity. The Appellant is the owner of a small feu of about an acre and a half in extent near *Airdrie.* The surface of the ground is occupied by miners' cottages or houses, and underneath there was coal. When the Appellant bought the feu some time ago he appears to have been under the impression that the minerals under this feu, as under all the ground which surrounded it, had been reserved by the superior. In point of fact that was a mistake. The superior kept in his hand the minerals under all the ground around, but under this acre and a half the coal had not been reserved in the grant of the feu now owned by the Appellant. The Appellant, therefore, although he did not know it, was the owner of the coal under this acre and a half of ground. The superior granted the whole property in all the surrounding

land to the company who are the Respondents, and they, just as the Appellant was ignorant of his rights, appear to have been ignorant of theirs. They appear to have been under the impression that they had the whole of the coal, including the coal under the acre and a half. They had the coal which surrounded the acre and a half, but they had not the coal which was underneath the acre and a half. In the process of their working they worked out the coal under the acre and a half, and when that was done it was ascertained (it is unnecessary to observe how the discovery came to be made) what the real titles were, and that this coal really belonged to the Appellant, and did not belong to the Respondents, who had got it and disposed of it. I ought to add that in working under the acre and a half of ground they had, by letting down or cracking the ground, caused some damage to the miners' cottages which stood upon the surface of the acre and a half.

Now, my Lords, under these circumstances the question arises, what is the measure of damage to which the Appellant is entitled? We may put aside some elements which might occur in some cases, but which do not occur in the present case. There is absent here the element of any wilful trespass or wilful taking of coal, which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done. We may put aside another element which might have occurred. It might have been the case that the support of the coal under this acre and a half of ground had been of some peculiar advantage or benefit to the Appellant, for which no money would compensate him. Either by some use made of the surface, or by some specific use intended to be made of the surface, there might have been a peculiar need for the support of the minerals underneath, which might either have made it impossible to estimate the damage, or might have made the estimate of the damage exceptionally high. Neither of these elements occurring—neither the element of what I will call wilful trespass, nor the element of special and exceptional need of support—the case is one in which your Lordships have simply to ascertain what is the ordinary measure of damage for the coal taken, or what, in other words, is the value of the coal that was taken.

H. L. (Sc.)
1880
LIVINGSTONE
v.
RAWYARDS
COAL
COMPANY.
Earl Cairns, L.C.

Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country, or in *Scotland*, that you have a right to follow the article which is taken away, the coal which is severed from the inheritance, into whatever place it may be carried or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken.

I own that it appears to me that the Court of Session have adopted a principle which is not unsatisfactory for the purpose of ascertaining that value. They have said, The value to this Appellant is not the value which he could have derived from himself working the coal and taking it into the market, because he could not have worked it; the area is so small that it would have been impossible for himself to have worked and used the coal, and earned a profit, or put an additional value upon the coal by so working it; he must have gone to some person, or waited till some person came to him who had the power of working the coal from adjacent working; therefore (say they) the value is that which he could have obtained from somebody else who would have come and taken the coal as it stood *in situ*, and who would have worked it and turned it to account. Then they go to the witnesses of the Appellant, and they must take Mr. *Rankine*, his principal witness; and I observe that another witness of the same stamp and character as Mr. *Rankine* immediately follows, who wishes his testimony to be taken as repeating Mr. *Rankine's in omnibus*. Therefore those two witnesses must be taken to say this. Mr. *Rankine* is asked this question: "Suppose you had been asked by Pursuer whether it would be advisable for him to sell the whole of these minerals to Defenders for £100, the Defenders paying compensation for the damage to the houses, would you have advised him to take it?" And his reply is: "The advice I have invariably given—I have done it in two instances within the last two years—is, 'Don't let your coal for a less lordship than that obtained by the adjoining proprietor;' and in that case I should have said to the Pursuer,

'Do not take less than £171 7*s.* 6*d.* for the coal, plus the damage to the houses.'" He says that the advice which he would have given to his client would have been not to sell for less than (which implies, of course, to sell for) £171 7*s.* 6*d.*, plus the damage done to the surface; that is to say, that if there had come to him some person who, from possession of the adjoining property, had been able to work this coal, and had asked the Appellant to sell the coal to him, the Appellant would have been advised to reply, "I will sell you the coal for a royalty, that is to say, a sum per ton which will produce to me £171 7*s.* 6*d.*; but in addition, you must undertake to pay me whatever damage is done to my houses which are upon the surface of the land;" and, for the purpose of the present argument the amount of damage as ascertained and not objected to is a sum of £200.

Upon that evidence the Court of Session say, "We are of opinion that the value to this Appellant of this coal was the money that would have been produced if he had sold the coal, and the money that he would have got if he had sold the coal would have been £171 7*s.* 6*d.*; but that would have been accompanied and guarded by a further payment which would have indemnified him for the damage done to the houses upon the surface in getting the coal, and that further sum he must have, in addition to the £171 7*s.* 6*d.*"

My Lords, I own that under the very peculiar circumstances of this case, there being only the element to consider to which I have referred, namely, the element of value to the Appellant, I think he has received in the judgment of the Court of Session that which is the proper value, and I see no reason for differing from the judgment of the learned Judges. I therefore advise your Lordships, and move your Lordships, that the appeal be dismissed with costs.

LORD HATHERLEY:—

My Lords, after carefully considering the case I have come to the same conclusion, though at one time I was under the impression that there was more in the question of the sale by royalty being as it were enforced than I at present think.

The case is certainly a very peculiar case, and, without with-

H. L. (Sc.) 1880 LIVINGSTONE v. RAWYARDS COAL COMPANY. Lord Hatherley.

drawing from any of the principles which I found in the case of *Jegon* v. *Vivian* (1) to be established by the prior authorities, I think this case may be disposed of, and will be disposed of, by your Lordships in entire consistency with those principles. There is no doubt that if a man furtively and in bad faith robs his neighbour of property, and, because it is underground, is probably not for some time detected, the Court of Equity in this country will struggle, or I would rather say will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been the one working and the other permitting the working through a mistake.

The Courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud. In the present case, it is clear on both sides that each party was ignorant of the rights of the Pursuer, and consequently the matter is not to be treated as a case of forced sale, but as a case of sale which has taken place by inadvertence; and what we, as a Court of Justice, have to do is to see that under these untoward circumstances that which never ought to have been done at all, but which has been done either through want of watchfulness or through want of knowledge, as the case may be, and which has occasioned in the doing an injury to either of the parties, is remedied and set right, so far as it can be, upon equitable principles. Those principles are no doubt settled by the authorities, many of which have been cited in the course of this argument; those principles are that the owner shall be re-possessed as far as possible of that which was his property, and that, in respect of that which has been destroyed, or removed, or sold, or disposed of, and which cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that

(1) Law Rep. 6 Ch. 742.

being done which has, by misfortune and inadvertence on both sides, and through no fault, been done. Perhaps the law may have even gone a step further than in some cases might be necessary. Each case must stand upon its own particular foundation in that respect; but, regard being had to the rule *vigilantibus non dormientibus*, it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment, and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

In this case we are singularly free from any difficulty upon the point, and the parties seem to have carried on the litigation on a principle which does them credit, and on which one wishes to see all litigation carried on. They say, "The misfortune has taken place: we neither of us knew anything about this at the time, and now that it has taken place let us see what can best be done to remedy the misfortune which has so occurred." We find the position of the case to be a very singular one indeed, and one which is not likely to recur in many instances, though it may in some instances—it is this. A small piece of ground, an acre and half in extent, being the property of the Pursuer, is surrounded by the property of the Defenders; and the Defenders thought (and the Pursuer thought so too) that it was included in their property, instead of being a separate portion surrounded by their property. That being the case, one thing was perfectly clear (and I shall make it clearer presently by reading the Pursuer's own evidence), that nothing could be made by the Pursuer of this acre and a half of ground by working it himself. He would not sink a shaft or put up a steam-engine, or use any of the ordinary modes of working a mine, in respect of this acre and a half of ground; and indeed, that is what he tells us himself, because, in words which were read by the learned counsel who last addressed your Lordships, the Pursuer says, in his own appendix of proofs, on re-cross-

H. L. (Sc.) 1880 LIVINGSTONE v. RAWYARDS COAL COMPANY. Lord Hatherley.

examination: "If the Defenders had not taken away this coal, I might have arranged with them to take it away through their pit, but I don't think it would have been profitable to have done so; I would rather have it standing. I don't think there was any way in which I could have turned this coal into money;" and then he goes to another subject. Several houses were built upon this property; they were apparently small cottages, not of a very heavy description in themselves, and he complains that if he were minded (though it does not appear that he ever was so minded) to build a manufactory or some large building upon the ground, he would not, in consequence of its being so worked by the Defenders, be in a position to find a foundation for his building. Whether he refers to that when he says that he would rather have it remain as it was I do not know, because in his evidence he touches upon it very lightly; but he says that he could not work it himself, and that there were no people to whom he could dispose of it but the Defenders themselves.

My Lords, that being so I do not know what better mode there could have been for ascertaining what the value of the property in this case was, than by doing what the Pursuer himself says he should have been obliged to do in order to turn it into money, and what his own agent, Mr. *Rankine*, said he always advised him to do. Mr. *Rankine*, his agent, said: "It is not workable by yourself in consequence of its small size, and of its so being surrounded by other property—so make the best you can of it, only do not let yourself be driven into a corner. You may perhaps find yourself put to a disadvantage by having only one purchaser; nevertheless, do not part with it for a less royalty than you could get from anybody else, and whatever others are willing to pay I should stand upon, and if you cannot get that I should insist upon retaining the property in its present shape." That being so, the Pursuer says in his evidence, "I don't think that there was any way in which I could have turned this coal into money. It was about the middle of 1875, when the houses began to crack, that I first knew the Defenders were in the course of working out coal under my feu. I spoke about the matter to Mr. John *Motherwell*. I did not ask that the working should be stopped. I suggested that it should have been wrought stoop-and-room for the sake of

protecting the property as much as possible. I made no objection to their going on with the working out of the coal below the feu; I was quite content that they should go on with the working." That was before he knew that the coal under the property was his own. Up to that time he could not of course know very well what rights he had to stop this working; but when you put the two sentences together,—one, that he could not have disposed of the property to any other persons, and the other, that he did not think of taking any steps to stop the working, I think he cannot complain that he has got from the gentlemen the very same terms that he would have got from the adjoining proprietors with whom he has to deal.

The learned Judges in the Court below seem to have proceeded upon that footing. The Lord President says, "In addition to the consideration above mentioned, it must be kept in view that the coal in question was surrounded on all sides by the coalfield of the superior, which is leased to the Defenders. As the Pursuer's estate is only one and a half acres in extent it is evident that the coal under it could not have been worked to profit by himself working independently. Nobody but the superior or his lessees could have worked the coal to any profit. Now, let us consider the position of the Pursuer before the Defenders commenced to work his coal. He was then in possession of a certain piece of coal, and his object must be assumed to be to make the most of it. It cannot be assumed that he could contemplate keeping the coal as a support for his cottages, instead of working it out. It was situated in a part of the country where every available bit of mineral is in use to be wrought. Now, at that point of time, had the parties come together the coal would in all probability have been disposed of to the Defenders on terms mutually advantageous. The Pursuer says indeed, that he could have made exceptionally good terms for himself, as his coal stood in the way of the Defenders' working. But I think when Mr. *Smith* spoke of the Defenders' necessity being the Pursuer's opportunity he went too far. I do not think that the purchase of the Pursuer's coal was a matter of necessity to the Defenders, but only a matter of convenience. There was nothing to prevent their working round his coal. But, on the other hand, if the Pursuer wished to

H. L. (Sc.) 1880 LIVINGSTONE v. RAWYARDS COAL COMPANY. Lord Hatherley.

make the most of his coal he must have taken what the Defenders would give him, or let it stand." In that state of things, and finding that the coal has so been worked out, the learned Judges say, "We find that the best mode, in this particular case, of ascertaining the proper measure of damages is to give the Pursuer what the books and cases tell us we are to give him, that is to say :—As far as possible, the value of his coal, and that we will do by saying that he shall be compensated to the same extent as others have been compensated in adjoining properties; besides that he shall be compensated, and he has been by the decree compensated, for any damage done to the buildings upon the surface." That has been estimated at £200, and acquiesced in by both parties. He is paid for the royalty £171; he is paid for the value of the coal which has been disposed of; and therefore it seems to me that all he can possibly ask for has been given.

Post 43.

The question of way-leave does not seem to have been argued in the Court below, but if it had been argued I should have been prepared to say that I acquiesce in this particular case, and under all the circumstances of this case—which I think are extremely different in many remarkable particulars from those of *Jegon* v. *Vivian* (1)—in the interlocutor pronounced by the Lord Ordinary. But, looking at the form in which this case has been brought before us, no question of this kind arises. Nothing could have been properly estimated and given as the value of the right exercised by the Defenders of taking their waggons and coals from time to time through the ground of the Pursuer, they assuming it to be their own ground. What profit can be said to have been derived from that? The profit is this: that you save distance; you save other payments which you might have had to make, and therefore, inasmuch as the Pursuer cannot make out that the slightest damage has accrued to him in respect of that user, what you have to pay to him is only the value of his coal plus the damages to the surface. It appears to me to be quite consistent, and that the Pursuer rightly has not pressed that case of the way-leave, because he would have done so with very little effect.

Therefore, under all these circumstances, I am prepared to acquiesce entirely in the judgment of the Court below.

(1) Law Rep. 6 Ch. 742.

LORD BLACKBURN:—

I also think that the judgment of the Court below should be affirmed, and that consequently the appeal should be dismissed with costs.

The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the Defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the Pursuer, then comes the question,—how are we to get at the sum of money which will compensate them?

Now, my Lords, there was a technical rule in the English Courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owners of the fee was to be paid the value of the chattel at

H. L. (Sc.) 1880

LIVINGSTONE v. RAWYARDS COAL COMPANY.

Lord Blackburn.

the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

Such was the rule of the Common Law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron *Parke* put this qualification on it, as far as I am aware for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the Plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal-field (1). That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon* v. *Vivian* (2), which has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoing the point that is to be made out for the damages is, as was expressed in the minutes of the decree:—"The Defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the Defendants at the fair market value of the district;" that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil. That, I apprehend, is what is to be done here, and that is what both the Lord Ordinary and the First Division of the Court of Session have endeavoured to do. They have come to different pecuniary results, and the question really comes to be which is correct.

Upon that the Lord Ordinary, as I understand, has gone upon this position. He said, "I have taken evidence, and the result of

(1) *Wood* v. *Morewood*, 3 Q. B. n. 440. (2) Law Rep. 6 Ch. 742.

that is, that it is agreed on all hands that this coal, when it was brought to the surface, actually did sell for £1768 5*s.* 10*d.* I look at the evidence, and I take the evidence to be that the actual amount expended by the Defendants (there is contradictory evidence on such points as might have been expected, and it is not all very clear), was 4*s.* 3*d.* per ton"—and, deducting that from the £1768 5*s.* 10*d.*, he makes it £515 12*s.* 1*d.*, which is what he says is the sum that the Pursuer ought to recover taking off all the expenses that the Defenders have incurred. But then, as it would necessarily follow, when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over. You must not take that sum as being a matter which you are to be paid for, and also take the coals as if they had been got out without damage. On the Lord Ordinary's figures, as it seems to me, the £515 12*s.* 1*d.* would be right, and if there was no other way of getting at the figures, if you could not get evidence of the value of the coal *in situ* in a more correct way, I suppose it would be right to take them in that way. It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

But then the Lord Ordinary himself observes that, taking that way of getting it, and giving the Pursuer £515 12*s.* 1*d.*, "The truth of the matter is, that the removal of the Pursuer's coal by the Defenders, in place of being a misfortune, has been to the Pursuer a singular stroke of luck. The size of his feu is less than an acre and a half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the Pursuer might have endeavoured to make with the Defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short of what has been awarded by the Lord Ordinary. The lordship, in the circumstances, could not be expected to be higher than that paid by the Defenders for the adjoining portions of the seam ;

H. L. (Sc.) 1880

LIVINGSTONE v. RAWYARDS COAL COMPANY.

Lord Blackburn.

and this, upon the quantity taken out, even if increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500." Now, when you find that the Lord Ordinary himself, who is professing to ascertain what is the money value of the damage that the Pursuer has received, says: "I have got at it in this particular way, but that money value is very considerably above the damage that you have received: it has been a singular stroke of good luck to you that you should get it," it occurs to one at once, *primâ facie*, that there must have been something wrong in the way in which that money value was got at, and I think that there was an error in it, and that error was that the Lord Ordinary thought he was bound by decisions (which I do not think he was) to take that mode, and that mode only, of getting at the value of the coal *in situ*, namely, the price which the coal fetched when it was sold, deducting from that the cost of hewing and drawing and so forth, and so to ignore totally the fact this was an isolated small patch of land from which the Pursuer, as he himself admits, could not possibly have got coal by any practical means whatever, except by bargaining with the Defenders. I think there the Lord Ordinary was under a mistake. The Lord President points out very clearly to my mind that the Pursuer could not have made any use of his coal at all as long as he did not let it to the Defenders, who were the only people who could take it. He cannot do more than ask for his damage to the surface. That he is of course entitled to, as the Defenders have taken his coal without his leave and against his will. If they had taken it with full knowledge *scienter* there would have been very much more damage given; but they have innocently and ignorantly taken away his coal. "And then" (says the Lord Ordinary), "we must see what was the value of the coal *in situ* as it stood there to the Pursuer at the time when the Defenders by mistake took it away, and for that we must give compensation." Then he takes the evidence of Mr. *Rankine*, and says, "That is the best evidence that we could have of the value of the coal," and that sum is what the Court of Session has given.

My Lords, I only wish to say one word to guard against any misapprehension on a point which I at first a little misappre-

hended. I do not think that this decision of the Court of Session is that the royalty is the measure of the damages. It is only that it is evidence of the value which is the measure of the damages. As to the other matters, about the way-leave and so forth, I quite agree with what has been said by my noble and learned friend on the woolsack, that inasmuch as in the Court of Session on appeal from the Lord Ordinary those questions were not raised again they are not before this House at all. If they were, I should be inclined to agree with what has been said by my noble and learned friend opposite (1), and the Pursuer would gain very little benefit from that contention.

Interlocutor appealed against affirmed; and appeal dismissed with costs.

Lords' Journals, Feb. 13, 1880.

Agent for Appellant: *Andrew Beveridge.*
Agents for Respondents: *Simson & Wakeford.*

(1) Lord *Hatherley*, see p. 38.

[HOUSE OF LORDS.]

H. L. (Sc.) 1880 Feb. 27.

RANKIN AND OTHERS, Trustees . . . Appellants;

LAMONT . . . . . Respondent.

Superior and Vassal—Implied Entry—Conveyancing (Scotland) Act, 1874, *s.* 4, *sub-s.* 2, *s.* 5—*Whether Trustees liable as Singular Successors.*

The *Conveyancing (Scotland) Act*, 1874 (37 & 38 Vict. c. 94), s. 4, enacts that every proprietor who at the commencement of the Act shall be duly infeft in any lands which have been feued, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior—to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.

A testator, who died on the 5th of March, 1873, conveyed to trustees by trust disposition his whole heritable estate. The trustees were *inter alia* to pay certain legacies and gradually extinguish the testator's debts; after which they were to entail the lands upon *P. R.*, the heir-at-law of the testator, if then alive and of the age of twenty-five, and his heirs male, whom failing certain other persons. Heirs female were to be excluded, and the trustees were given power to sell or excamble any part of the lands. The trustees became infeft in the estate by recording a notarial deed in the register of sasines in March, 1874. In part of the lands the testator had been the last entered vassal; and the superior, of those lands, demanded from the trustees a casualty of composition of a year's rent on the ground that they were singular successors. The trustees contended that they were not liable for any casualty whatever, the heir *P. R.* being willing to enter with the superior and pay a casualty of relief—a duplicant of the feu duty—but that, in any event, they were only liable for a casualty payable by an heir.

Held (affirming the decision of the Court below), that the trustees being impliedly entered with the superior, and being singular successors of the last vassal, were liable in a casualty amounting to a year's rent; and that the heir of the last entered vassal could not now be tendered to the superior for entry, and so relieve the trustees of payment of the higher casualty.

Ferrier's Trustees v. *Bayley* (Court of Sess. Cas. 4th Series, vol. iv. p. 738), and *Rossmore's Trustees* v. *Brownlie* (Court of Sess. Cas. 4th Series, vol. v. p. 201), approved.

APPEAL from the Court of Session in *Scotland*.

Patrick Rankin, of *Auchingray*, was the last vassal vested and seised in some lands of *Achagole*, county *Argyle*, of which Mr. *John Henry Lamont*, the Respondent, is the lawful superior.

On the 5th of March, 1873, *Patrick Rankin* died, leaving a

trust disposition and codicil attached, by which he conveyed to the Appellants, as his trustees, his whole heritable and moveable estate for certain uses and purposes therein specified. The trustees were directed *inter alia* to pay certain legacies, and then specially to extinguish all the testator's debts, after which they were to entail the estate on *Patrick Rankin*—the testator's grandson and heir-at-law—if he had survived, and was upwards of twenty-five years of age, and on his heirs male; whom failing, to certain other persons specially designed, expressly excluding heirs female. The deed gave the trustees power to lease the minerals, and of feuing and sale by public roup of the lands. In fact, the testator seemed to contemplate the trust would be of long continuance.

The dispositive clauses being in general terms the Appellants made up their title, *inter alia*, to the lands of *Achagole* by notarial instrument in their favour recorded in the general register of sasines on the 27th of March, 1874. They were therefore proprietors in the said lands when the *Conveyancing* (*Scotland*) *Act*, 1874, came into operation in October of that year. Thereupon this action was raised, the Respondent on a summons concluding for declarator that in consequence of the death of *Patrick Rankin* a casualty payable by singular successors (1), being one year's rent, £141 6*s*., to the lands of *Achagole*, was due to him as superior by the Appellants. The lands of *Achagole* were held of the Respondents at the free feu duty of six merks Scots; but the composition payable at the entry of singular successors was untaxed, and was therefore a year's rent.

The first plea in law for the Respondents was, that the Defenders (Appellants) as singular successors infeft in the lands, and others described in the summons, are in consequence of the death of Mr. *Patrick Rankin*, and of the implied entry under sect. 4 of the *Conveyancing* (*Scotland*) *Act*, 1874, liable to the Pursuer (Appellant) as superior of the said lands in payment of composition.

The pleas in law of the Appellants were: 1. The averments of the Pursuer (Respondent) were not relevant or sufficient to support the conclusions of the summons; 2. The heir of the last entered

(1) Singular successors are distinguished from successors by the law of descent as taking the land by a special or singular title either as purchasers, creditors, &c. (Bell's Prin. s. 783.)

H. L. (Sc.) 1880

RANKIN v. LAMONT.

vassal being willing to enter and pay relief duty accordingly, the action could not be maintained (1).

They further maintained in the Court below that in any event they were not liable for any casualty or payment other than the casualty of relief, in respect that they held the property only for the heir of the last vassal.

The Court of Session on the 26th of February, 1879, adhering to the interlocutor of the Lord Ordinary (2) (dissenting Lord *Young*), found the Appellants liable in the casualty of composition of a year's rent, on the grounds that they were singular successors of the last entered vassal, and by virtue of the *Conveyancing (Scotland) Act*, 1874, were fully entered with the superior; and that it was not now competent for the heir of the last vassal to claim an entry, and so relieve the Appellants of payment of a composition (3).

On appeal,

1879. Dec. 11 and 12. Mr. *Russell*, Q.C., and Mr. *Dickson* (of the Scotch Bar), maintained for the Appellants that before the Act of 1874 came into operation if the heir offered to take an entry the superior was bound to accept him as vassal on payment of a duplicate of the feu duty; and that, whoever might be the proprietor actually possessing the beneficial interest in the *dominium utile* of the lands. If the last vassal's heir refused to take an entry, then, but only then, could the superior compel the singular successor to enter and pay the casualty of composition. The heir being willing to enter here, the only question was, whether this mode of avoiding the heavy composition of a year's rent still subsists. They contended that the right still existed, the statute

(1) In *Ferrier's Case*, decided in the Second Division, Lord *Gifford* differed from the Lord Ordinary (Lord *Curriehill*) and Lord *Moncreiff* and Lord *Ormidale*, who were all of opinion that the full year's rent was exigible by the superior. In *Rossmore's Case*, decided in the First Division, Lord *Deas* dissented from the judgment, but the other three Judges, the Lord President (Lord *Inglis*), Lord *Mure* and Lord *Shand* affirmed the superior's rights to the full composition. In that case no judgment was pronounced by the Lord Ordinary, and in this case Lord *Young* differed from the Lord Ordinary and Lord *Ormidale*; and Lord *Gifford* felt himself bound by the two cases of *Ferrier* and *Rossmore*.

(2) Lord *Curriehill*.

(3) Court of Sess. Cas. 4th Series, vol. vi. p. 739; Scot. Law Rep. vol. xvi. p. 387.

in question having been carefully framed, with the view to prevent any compulsory alteration of the pecuniary rights of the superior and the vassal (1). It preserved the rights of the superior by providing that his title to a casualty should not be prejudiced by the "implied entry;" and he was given the right to raise an action of declarator for the casualty. Then the vassal's rights were preserved by the 3rd sub-section of the 4th section, providing that such "implied entry" shall not entitle any superior to demand any casualty *sooner* than he could by law prior to the Act have required the vassal to enter, or to pay such casualty, irrespective of his entering. But by law prior to the Act no singular successor could be required to enter, or to pay the casualty of composition, irrespective of his entering, so long as the heir was willing to enter and pay the casualty of relief, as is the case here. The Respondent says, that the fee being already full by virtue of the "implied entry," it is impossible for the heir to come forward now and ask for an entry. But one object of the statute is to preserve unchanged the pecuniary rights of the parties, therefore, where pecuniary rights are concerned the "implied entry" is to be disregarded and parties dealt with as if no such "implied entry" had taken place. The hardship of the decision of the Court below was apparent, for before October, 1874, they could have met any demand of the superior for composition by tendering the heir, but now not only have they to pay one year's rent in respect of their own "implied entry," but when they denude and convey the estates to the heir of the last entered, he, being a singular successor of the Appellants, would require to pay another year's rent. The construction put by the Court below on the Act not only very seriously affected the pecuniary interest of the parties, but instead of simplifying the forms of conveyancing, in doing away with fictitious superiorities and fictitious vassalages, it would directly stimulate and increase such defeasible mid-superiorities, for, in order to prevent the "implied entry" with the disponee's superior conveyances in future, it was most probable, would be expresly made *de me;* thus the main purpose for which the Act was passed would be frustrated (2).

(1) See Lord *Deas'* opinion, Court of Sess. Cas. 4th Series, vol. vi. at p. 220.

(2) Lord *Young's* opinion in the Court below, Court of Sess. Cas. 4th Series, vol. vi. at pp. 749, 750, and end of p. 755.

H. L. (Sc.) 1880 RANKIN v. LAMONT.

[They referred to *Bell*, Prin. ss. 719, 1056; *Erskine*, Inst. 2; 7; 6 and 7; *Magistrates of Musselburgh* v. *Brown* (1); *Dundas* v. *Drummond* (2); *Hill* v. *Mackay* (3); *Piggott* v. *Colvill* (4); *Magistrates of Hamilton* v. *Swim* (5); *Hyslop* v. *Shaw* (6); *Ferrier's Trustees* v. *Bayley* (7); *Rossmore's Trustees* v. *Brownlie* (8); *Sivright* v. *The Straiton Estate Company* (9); and *Morrison's Trustees* v. *Webster* (10).]

Mr. *Benjamin*, Q.C., and Mr. *Balfour* (of the Scotch Bar), contended, for the Respondent, that the only question argued here was that of the statutory question. They admitted that previous to the Act of 1874 the plea of the Appellants would have been sound, the heir could be entered and become the vassal; but the provisions of the statute entirely abolished the forms of conveyancing which made it possible for the heir of the grantor of a disposition to enter in the place of the disponee. The disponees who recorded their conveyance were already entered by force of the statute, therefore what was the heir to pay for, the fee being full? The old form was only good for giving the outside heir an opportunity for exacting a bribe, for this the Conveyancing Act gave no compensation, and destroyed the old feudal practices, and brought the representative of the deceased vassal, or the person who put himself in possession of the estates by registration, into immediate connection with the superior as the only person now to be called upon to pay the casualty. In fact the Act was not merely to facilitate and simplify the forms of conveyancing, but to sweep away the creation of mere technical base-fees and mid-superiorities, and make it no longer possible to interpose between the superior and his real vassal, the person in actual beneficial possession of the lands. The 3rd sub-section of the 4th section was to provide against the evil of the superior demanding the casualty at once, even when he had an entered vassal, specially providing that the

(1) M. 15,038.
(2) Ibid. 15,035.
(3) Court of Sess. Cas. 1st Series, vol. ii. (1st ed.) p. 681; (2nd ed.) 574.
(4) Court of Sess. Cas. ibid. vol. viii. p. 213.
(5) Court of Sess. Cas. 2nd Series, vol. xvi. p. 437.
(6) Court of Sess. Cas. 3rd Series, vol. i. p. 535.
(7) Court of Sess. Cas. 4th Series, vol. iv. p. 738, and at p. 748.
(8) Court of Sess. Cas. ibid. vol. v. p. 201, and at p. 219.
(9) Court of Sess. Cas ibid. p. 922.
(10) Court of Sess. Cas. ibid. p. 800.

infeftment shall only give the superior the right to the casualty at the time he would have got it formerly, that is, when the fee was no longer full. Also, now, there was no difficulty about the entry of trustees or corporations, for in such cases casualties are to be paid after a fixed number of years: sect. 5.

[They cited and commented on, in addition to the above cases, *Ivory's Erskine's* Inst. of 1824, vol. i. p. 396, note 158; *Erskine's* Inst. 2; 7; 1; *Bell's* Prin. (1839 ed.) p. 724; *Menzies'* Conveyancing (2nd ed. pub. 1857) p. 776; *Shaw* v. *Hyslop* (1); *Piggott* v. *Colvill* (2).]

EARL CAIRNS, L.C.:—

Feb. 27. My Lords, in this case the Appellants are the trust disponees of *Patrick Rankin*, who died on the 5th of March, 1873. *Patrick Rankin* held certain land at *Achagoyle* of the Respondent as his immediate lawful superior, and in this land the Appellants were duly infeft conform to notarial instrument in their favour recorded in the Division of the General Register of Sasines on the 27th of March, 1874.

By the *Conveyancing* (*Scotland*) *Act*, 1874, which came into operation on the 1st of October in that year, it is enacted (sect. 4), that "every proprietor who at the commencement of the Act shall be duly infeft in any lands (which have been feued) shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice."

It is not disputed that, according to the law and practice existing at the time of the passing of the Act, if the Respondent had granted to the Appellants a writ of confirmation, the Respondent would have been entitled to be paid a casualty, and that such casualty would have been a composition and not merely a relief payable by an heir. Neither is it disputed that the Respondent might have refused to grant the writ of confirmation until this composition was paid, and might have resumed possession of the fief, and held it for his own use, till some one having a right to be entered as vassal came forward and made the proper payment.

(1) Court of Sess. Cas. 3rd Series, vol. i. p. 535.

(2) Court of Sess. Cas. 3rd Series, vol. viii. p. 213.

BIBL. LONDIN UNIV.

H. L. (Sc.)
1880
RANKIN
v.
LAMONT.
Earl Cairns, L.C.

The Act further provides that the implied entry shall not prejudice or affect the right or title of the superior to any casualties due or exigible in respect of the land at or prior to the date of entry; and it enacts that no land shall any longer be deemed to be in non-entry; but a superior who might have sued an action of declarator of non-entry may raise in the Court of Session against the successor of the vassal an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action.

This is the action which the present Respondent has raised. He alleges that the Appellants by reason of their infeftment are to be deemed and held to be duly entered with him the Respondent to the same effect as if he had granted a writ of confirmation. He alleges further that upon such entry he would have been entitled to be paid by them a composition and not merely a relief, and he sues for this composition accordingly.

Whether he has this right is a question upon which the learned Judges in *Scotland*, on the different occasions on which since 1874 the questions have come before them, have not been unanimous; six of the nine Judges who have at different times considered this question being of opinion that the superior has the right, and three thinking that he has not. I am clearly of opinion that the construction put by the majority of Judges upon the statute is correct. The words of the statute are in my opinion clear and unambiguous. The substance of the argument for the Appellants was this: that in the present case the heir was ready to enter, that they might according to the old practice have tendered him as vassal, and that if they had done so a relief only, and not a composition, would have been payable.

Putting aside the difficulty of determining whether the heir is or is not willing to enter, and whether he would continue to be willing, I am of opinion that there is no longer any room for his entry, and, if so, there can be no ground for contending that he can enter and that a relief is to be paid. The Appellants are by the Act deemed and held to be duly entered, and, if so, there is no vacant fief into which the heir could enter.

The learned Judges who are in the minority are obliged to start with the assumption that the Legislature meant to leave pay-

ments to a superior exactly as they were, and not to give him in any case a title to a more valuable casualty than he would have had if the Act had not passed. I find no such purpose or intention declared in the Act. There is indeed a provision at the end of sub-sect. 3 of sect. 4, that the implied entry shall not entitle a superior to demand a casualty *sooner* than he could by the law prior to the Act or by the conditions of the feu right have required the vassal to enter. There is no enactment that the superior shall not demand a *greater* casualty than he could have had if the Act had not passed and the entry had been the entry of an heir, and I am unable to interpolate these words into the Act. On the whole I am of opinion that the Respondent is entitled to what the Court below has given him, and I move that this appeal should be dismissed with costs.

LORD O'HAGAN :—

My Lords, the question in this case is manifestly one of difficulty, as it comes before us after three full discussions in the Court of Session, each of which was followed by elaborate judgments; and in each of them the Judges were divided in opinion. Six went for the view which has been pressed by the Respondent, and three for that urged on us by the Appellant. And the difference affected at once the policy and aims of the statute, which was the subject of debate, the construction of its terms, and the nature of the practice, which having prevailed before the passing of it, was proper to be regarded as assisting to indicate the purpose of the Legislature and the character of the change which it desired to accomplish.

Some of the learned Judges regarded that statute as a mere conveyancing Act, leaving the substantial rights and relations of superiors and vassals altogether unaltered; whilst others, looking with much disfavour on the old feudal niceties which they described as encumbering and embarrassing the progress of titles, and authorizing devices for the defeat of legitimate rights, ascribed to it the design of doing away with, as was said by the Lord President, "barren and useless estates of mid-superiority," so as to prevent technical or formal interference with the real interests of persons beneficially entitled.

H. L. (Sc.)
1880
RANKIN
v.
LAMONT.
Lord O'Hagan.

There was another conflict as to the practice before the statute. On the one side it was alleged that the superior was accustomed habitually to insist upon the casualty of a year's rent, although the demand was sometimes evaded by putting forward the heir, and paying the relief duty only; and, on the other, that the demand of the casualty was the exception and not the rule.

As to the latter controversy, in such a balance of authority, it seems to me impossible that your Lordships can reach a satisfactory conclusion; and I think that you must therefore avoid the consideration of it, and with it, of the argument from the hardship alleged to be attendant on the Respondent's construction of the Act. But on the other subject of dispute between the Judges, this House is competent to form an opinion; and there seems to me to be good reason for regarding the Act of 1874 as designed at once to modify the forms of conveyancing, and to work material changes in the Scottish Law of property.

Lord *Gifford* (1) states, as the ground of his opinion, that the statute is "a mere conveyancing Act" not intended to enlarge "in any degree" the rights of superiors, or to enable superiors to demand from vassals "any other or different casualty" than they could have exacted if it had never been passed. If this view be adopted by the House, the judgment of the Court of Session will be discredited; but if the Act, although a conveyancing Act, was framed substantially to affect the rights of superiors and vassals, and, in the words of Lord *Curriehill*, as to the particular case with which we have to deal, to abolish with that result a mere "technical device," "as well as the system under which alone it was formerly practicable," that judgment will be materially sustained.

If we were at liberty to examine the Report of the Law Commissioners of 1838 (2), to which one of the learned Judges refers at length, and compare its recommendations with the Act which was the outcome of it, the latter view would be much supported; but putting these recommendations out of account as scarcely legitimate guides to the construction of the statute, and looking only to the provisions it embodies, I am led to the conclusion which the Appellant assails. Its object is defined in the preamble to be not

(1) *Ferrier's Trustees* v. *Bayley*, Court of Sess. Cas. 4th Series, vol. iv. at p. 748.
(2) At pp. 74, 519.

merely to simplify the modes of making up titles, but "to amend the law relating to land rights *and* conveyancing, *and* to facilitate the transfer of land in *Scotland*." Is it possible to say that these words are not large enough to comprehend such a change in feudal relations and monetary claims with reference to land, as the Respondent alleges to have been wrought by the enactment? Whether his contention is just remains to be decided, but is there anything in the preamble to estop him from making it?

And when we run through the sections we find several of them which, more or less, make such alterations affecting such relations and claims in a very important way. I do not advert, on this branch of the argument, to the 4th section, which is the subject of controversy, or go into detail as to others which have been sufficiently pressed on the attention of the House; but I may note that whilst the rights of corporations and trustees are sensibly affected by the 5th section—whilst the provisions of the 15th for the redemption of casualties alter the relative positions of the superior and the vassal—whilst the superior is obliged *in invitum* by the 20th in certain circumstances to receive a fixed payment for carriages and services, and annual feu duties are regulated on a new basis by the 23rd—it seems difficult to maintain that the Act was not designed to alter, and was not successful in altering, at least to some extent, the pecuniary rights of the superior or the vassal. All these changes, be they great or small, are in the same direction and dictated by the same policy as would be indicated by the 4th section if the Respondent's construction should be put upon it; and they are all, as well as the 4th, within the scope of the preamble, as pointing to modification of rights as well as to facility of conveyancing.

I am, therefore, my Lords, disposed to concur with the general view of the majority of the Judges, as to the frame and purpose of the statute: and I proceed, very briefly, to consider the operation of the 4th section as applicable to the undisputed facts of the case. There is only one point for decision. In the Court below another was discussed, as to the peculiar liabilities of trustees holding property for an heir-at-law; but it has been abandoned, and was not argued here.

We have before us, on the one side, a superior, and on the other

H. L. (Sc.) 1880 RANKIN v. LAMONT. Lord O'Hagan.

a singular successor, clothed with such reciprocal rights as legally attach to those positions respectively. I need say nothing as to the circumstances which have induced this relation in the present cases, but, its existence being admitted, the sole question is, whether the superior can enforce payment of a casualty of composition—a year's rent—or only of a casualty of relief, payable by the heir—a duplicand of the feu duty? To one or the other he is entitled, and the Appellants insist that he can only demand the latter, raising their defence by the plea, "The heir of the last entered vassal, being willing to enter and pay relief duty accordingly, the action (*i.e.*, for the casualty of composition) cannot be maintained." The law bearing on this matter before the passing of the *Conveyancing Act* is not the subject of dispute. It was very clearly explained in the lucid argument of Mr. *Russell*, and it is stated thus by Lord *Deas* (1): "It does not admit of doubt that prior to the Act, a singular successor, when called upon to enter and pay a composition of a year's rent, might, with consent of the heir of the last-entered vassal, tender that heir as the person to be entered; and the superior was thereupon bound to enter the heir by precept of '*Clare Constat*,' and to accept a duplicand of the feu duty."

The heir was not obliged to enter. He must have done so of his own free choice. The duplicand feu duty was materially less than the composition; but, on paying it, the heir was entered as the vassal, and burthened with all the responsibility which attached to him as such.

It is plain, therefore, that, before the statute, the plea of the Appellants would have been a good one; and that, on the tender of the heir, the superior could have exacted only the relief duty payable by him.

Has the Act of 1874 altered the position of the parties? The answer must be given according to the construction to be put on the 4th section in its connection with the general scheme and operation of the statute. That section provides that "Every proprietor who at the commencement of this Act or thereafter may be duly infeft in the lands shall be deemed and held to be, as at

(1) *Rossmore's Trustees* v. *Brownlie*, Court of Sess. Cas. 4th Series, vol. v. at p. 216.

the date of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation."

With all the hesitation properly induced by the conflict of opinion among the learned Judges, as to the effect of this section, I have been unable to discover sufficient reason for differing from the view of the decisive majority, so deliberately considered and so repeatedly expressed.

The Appellants here are in the position, under the action of the statute, in which they would have been before it was passed, if the Respondent, as superior, "had granted a writ of confirmation." They are "proprietors." They have been "duly infeft in the lands." They must be "deemed and held to be," as at the date of the registration of their infeftment, "duly entered" with the superior (the Respondent), and whatever might have been the condition of a "duly entered" vassal after "a writ of confirmation," seems to be their condition now.

Then, it seems clear that when the vassal required confirmation which relieved him from previous liability, it was competent to the superior to demand his composition as a preliminary to the grant. It was the usage, as it was the right, of superiors to make and enforce that demand, and the actual grant was the best evidence that the proper casualties had been paid and other liabilities discharged.

When the confirmation was completed, it destroyed the mid-superiority. It brought the vassal and the superior into immediate contact, liberating the mid-superior from liability.

The statute aimed to abolish fictitious titles and recognise the reality of things; and the intervention of the heir, who had only the shadow of an interest, became apparently impossible when the statutable confirmation was accomplished.

A question was put more than once in the Court of Session, as to the possibility of carrying out the view of the Appellants, in the altered state of circumstances created by the Act. It was repeated at your Lordships' Bar, and neither here nor there was it met by a satisfactory reply. If the superior and the singular successor have been put into direct relation, if the intermediate

H. L. (Sc.) 1880 RANKIN v. LAMONT. Lord O'Hagan.

estates have been extinguished, and if there have been a statutable confirmation and a statutable entry, how can there be room for the intervention of the heir? If the singular superior has been entered, the heir can give him no defence against the exaction of the casualty.

I have already adverted to the argument founded on the hardship of taking from the singular successor the protection heretofore derived from the presentation of the heir; but even if there were such a hardship, it would not warrant refusal to enforce the provisions of the Act. Material changes, such as it was designed to effect, are rarely accomplished without inconvenience to individuals; and if they involve injurious consequences, the Legislature, which has authorized them, must interpose to rectify the mischief. But, as I have said, we have no sufficient reason, in the balance of judicial testimony, to hold that the old practice gave the singular successor generally an advantage which he will not enjoy under the law as it has been interpreted in favour of the Respondent.

The argument of the Appellants, founded on the 3rd sub-section of the 4th section of the statute, seems to me to have received a sufficient answer. That sub-section seeks to provide against certain consequences which might have attended the implied confirmation of infeftments under sub-sect. 4 of sect. 2, if they were not guarded against. A charter of confirmation before the statute discharged casualties and feu duties due at its date. Such a charter, it seems to be conceded, was not often granted by the superior until they were satisfied, and to prevent the implied confirmation of infeftments being held to discharge claims of that kind, whilst it was enacted "that such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry," the proviso was added that "such implied entry shall not entitle any superior to demand any casualty *sooner* than he could by the law prior to this Act, or by the conditions of the feu right, have required the vassal to enter, or to pay such casualty irrespective of his entering."

It has been fairly argued that the object of this proviso was to prevent the superior from demanding his casualty whilst he had a vassal regularly entered. He was entitled to it only when the feu was no longer full. And the word "sooner" points neither to the

amount of the payment nor to the person to make it, but to the period at which it would be exigible. "If," says Lord *Curriehill*, "at the date of the implied entry the feu happens to be full, the superior is not entitled to exact payment of the casualty until the death of the person who fills the feu, in other words, until the lands fall into the condition in which, prior to 1874, they would have competently formed the subject of an action of declarator of non-entry at the instance of the superior." The proviso forbade the superior to claim the casualty before he was entitled to it on the death of an entered vassal.

If it was intended further to limit his right, as well with reference to the amount as to the time of payment, the privilege of tendering the heir, and the sufficiency of his discharge of the relief duty might have been perpetuated by a few simple words. The right of the superior to his casualty is expressly reserved, and enforceable under the 4th sub-section by an action of declarator for payment of it, notwithstanding the implied entry; but he is not to enforce it as long as he has an entered vassal. There is no provision that he is not to enforce it, if the heir be tendered, even when the feu has ceased to be full. Such a plea might have been authorized by Parliament, but I do not see that it has been, directly or by any implication.

My Lords, this House has been always slow to differ from the learned Judges of the Court of Session on questions connected with Scotch conveyancing, and I should have had extreme hesitation in venturing to disturb the well-considered decision in this case, even if I had failed to appreciate fully the force of the reasons on which it has been formed. But those reasons commend themselves to my mind as strong and sufficient, and I am therefore of opinion that the appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, the only question which has now to be decided is what is the construction of the *Conveyancing* (*Scotland*) *Act*, 1874? That had been much considered in two cases, *Ferrier's Trustees* v. *Bayley* (1) in the Second Division, which was not unanimous, Lord *Gifford* dissenting, and again in *Rossmore's Trustees* v. *Brownlie* (2)

(1) Court of Sess. Cas. 4th Series, vol. iv. p. 738.

(2) Court of Sess. Cas. 4th Series, vol. v. p. 201.

H. L. (Sc.) 1880 RANKIN v. LAMONT. Lord Blackburn.

in the First Division, where again the Court was not unanimous, the majority agreeing in opinion with the majority of the Second Division, Lord *Deas* dissenting, and in the present case Lord *Young* has also dissented; so that of the nine Judges below who have had occasion to consider this question, six have taken the view favourable to the Respondents, and three have dissented from that view.

In considering this question, it is necessary to bear in mind the state of the law of real property in *Scotland* before the passing of the *Conveyancing (Scotland) Act*, 1874.

A superior was entitled to receive a casualty on each change of his vassal, he had not any direct remedy to enforce the payment of a casualty, but he was entitled to refuse to enter any one as his vassal until the casualty was paid; relief if the person entering was heir of the last vassal; composition if he was a singular successor; and when the fee became vacant (as sooner or later it must do, by the death of the vassal last entered), so that the lands became in non-entry, the superior had a right to resume possession of the fief and hold it for his own use till one having a right to be entered as vassal came forward and paid the casualty, of relief if he entered as heir to the last vassal, of composition if his right was to be entered as a singular successor. In this indirect way the superior had a very stringent remedy to obtain payment of a casualty. But the complicated system of conveying to hold *vel a me vel de me* enabled a purchaser and the heir of the vendor, if they could agree together, to obtain for the purchaser the benefit of a registered title and yet to pay only relief to the superior, instead of composition, except in cases where subinfeudation was effectually prohibited by the terms of the feu. This was done by entering the purchaser as sub-vassal holding lease of the vendor; and entering the heir of the vendor as vassal to the superior; and this mid-superiority so created might be kept alive and the proceeding repeated, and so *toties quoties* as long as an heir to the original vassal could be found willing to enter. I do not think there was anything dishonest or deserving of reprobation in this contrivance. If the purchaser thought it more for his interest to hold by a title, safe enough to hold by, but complicated and occasioning at intervals trouble and expense, rather than to pay a composition, he might be unwise but he was not dishonest. There

is a singular conflict of testimony as to the extent in which in practice purchasers took advantage of this device, but I think Lord *Curriehill* agrees that the power to do so caused superiors (in some cases at least) to compromise their claim to a year's rent, whilst Lord *Young* seems not to dispute that the superior generally got more than the relief which was all he would have been entitled to if the succession had been in truth and in fact, as well as in technical form, that of an heir to the former immediate vassal. But, though there was nothing dishonest in this contrivance, the keeping up of mid-superiorities, which were only nominal estates, complicated titles, occasioned unnecessary deeds and expense, and increased the chance of mistakes. The Legislature therefore determined to do away with them, and that was one main object of the *Conveyancing (Scotland) Act*, 1874. By doing away the system of nominal mid-superiorities the Legislature deprived purchasers of the power of using this contrivance as a means of postponing the time when a composition must be paid, or perhaps in some cases preventing its being ever paid, and unless the Legislature has provided some equivalent for this which is taken away, the effect must be to enhance more or less the pecuniary value of the superior's chance of getting a composition. The real question, in my opinion, is, whether the Legislature has provided any substitute for this contrivance which they have destroyed. I think that it has not done so. I agree that it was not the object of the Act to produce any change in the pecuniary relations between superior and vassal, and if I could see any reasonable construction of the language used by the Legislature which would avoid doing so, I should feel inclined to adopt that construction. But I do not think it would be justifiable to interpolate a scheme for this purpose not expressed by the Legislature, and, after having very carefully considered the judgments of each of the three Judges who formed the minority, I cannot but think that they have each of them put qualifications and restrictions on the language of the Legislature which I am inclined to think those who framed the Act did not intend to express; I am at all events decidedly of opinion that if they meant to express them they have not used such language as to justify a Court of law in construing the Act so as to give effect to them.

The 4th section of the Act, sub-sect. 2, enacts that a proprietor

H. L. (Sc.) 1880 RANKIN v. LAMONT. Lord Blackburn.

duly infeft in lands shall be deemed and held to be, as at the date of the registration of such infeftment, duly entered with the superior. This deprives the superior of the power to refuse such entry until his casualty was paid or secured, and would, therefore (if no other remedy was provided to enforce payment), put it in the power of every proprietor duly infeft to be entered without paying any casualty. The 4th sub-section abolishes non-entry altogether, and then proceeds to give a new remedy against successors to enforce payment of casualties. The superior "may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action." Such an action is here raised against the successors of the last-entered vassal for a year's rent, being the casualty exigible from them as being singular successors, impliedly entered as such; and the plea in law is that "the heir of the last-entered vassal being willing to enter and pay relief duty accordingly the action cannot be maintained." No such plea is, in terms at least, given by the 4th sub-section; and as the singular successor is already, by virtue of the 2nd sub-section, to be deemed to be entered, it is a contradiction to propose to enter the heir; he may be willing to enter, but he cannot. But each of the three dissenting Judges relies on the 3rd sub-section, the language of which is, I think, not at all happily chosen.

Lord *Gifford* reads the earlier words "that such implied entry shall not prejudice or affect the right or title of any superior to (*inter alia*) casualties which may be due at the date of such entry," as if the word "affect" was in an antithesis to prejudice, and so makes this equivalent to an enactment that the superior's right to a casualty shall not be either worse or better than it was before. I doubt much if those who used the words had any such antithesis in their minds. The words seem to me to have been inserted with a view to quiet the alarms of superiors who thought their rights were disregarded; and the proviso at the end of the sub-section is properly added in that view. I am unable to guess what was, as far as regards casualties, meant by saying that all rights and remedies competent to a superior for recovering or making effectual (*inter alia*) casualties shall continue to be available to the

superior. The words have a sensible meaning as regards feu duties, &c.; but as to casualties, all rights and remedies, either by way of refusing an entry without payment or compelling an entry, are expressly destroyed, and I know of no others. The utmost effect, I think, that can be given to those words is that they vindicate that those who used them would have preferred a scheme which left the pecuniary rights quite unvaried, if they had known how to frame one. But this does not, I think, justify a Court in attaching to the form of action given by the fourth sub-section a condition that such a plea as that pleaded here should be good. Lord *Gifford* does not seem to me to attach sufficient importance to the necessity of finding words in an Act of Parliament sufficient to express an intention on the part of the Legislature to give such a plea, even if the language used is such as to lead to a suspicion that those who used such words had a wish to produce such a result.

Lord *Deas* says (1) that the Legislature intended things to stand as they would have done if the deeds or instruments which would in the particular circumstances of each case have fallen to be executed had actually been executed; "whatever," he says, "would formerly have been done as a matter of title, is now to be held as actually done." I doubt whether it would have been thought judicious to enact this. In such a case as the present, where the disponer was settling his estate on the person who was his heir and the heirs of that person's body, it may be conceded to be tolerably certain that the heir of entail, who must necessarily be the heir of the disponer, would not have any objection to hold the lands directly from the superior, and to hold the estate tail base from himself as mid-superior; but where the heir of the vassal is a stranger, it would be very difficult indeed to say what he would have done if the circumstances had been different. It seems to me objectionable as being a scheme well contrived to produce litigation. But I base my judgment on this, that I can find nothing in the Act which expresses any intention to make such a scheme.

Lord *Young* says, that to compel every proprietor of land to enter with the over superior would subject some proprietors in casualties which they would not otherwise have had to pay; and

(1) Court of Sess. Cas. 4th Series, vol. v. at p. 220.

H. L. (Sc.) 1880 RANKIN v. LAMONT. Lord Blackburn.

without expressing any opinion as to the extent to which it would have this effect, I agree that it would, to some extent, have that effect, and would so far interfere with the relative value of estates of superiority and property. He thinks this so objectionable, that to avoid it he adopts a very strained interpretation of the third sub-section, by which, if I rightly understand it, the superior is never to receive composition from the purchaser on a sale so long as an heir of the vendor exists and the purchaser is willing to pay relief in his name. This would interfere with the relative values of superiority and property by prejudicing, indeed destroying, the right of superiors to composition, whether taxed or untaxed, in all feus where subinfeudation was not effectually prohibited, which is at least as objectionable as what Lord *Young* deprecates, and is, I think, much more clearly contrary to the words of sub-section 3.

Perhaps Lord *Young* meant to confine his judgment to the cases in which the heir not only existed, but would have been willing to enter if the law had not been changed. If so, his judgment comes to nearly the same thing as that of Lord *Deas*, and seems to me subject to the same objections.

I again repeat that I base my judgment on the absence of any language proper to express an intention to attach a condition to the action, given as against a successor for composition, that it should be a defence that there was an heir of the vassal last entered, who could under the old law have entered paying only relief.

The proviso at the end of sub-section 3 has not that effect. It is not now the question whether it postpones the time for bringing the action till after the death of the vassal last entered, and I express no opinion on that, either one way or the other.

I think, for these reasons, that the judgment below should be affirmed, and the appeal dismissed with costs.

Interlocutors appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 27th Feb., 1880.

Agents for Appellants: *Hewitt & Alexander.*
Agents for Respondent: *Faithful & Owen.*

[PRIVY COUNCIL.]

ANGUS ROBERTSON AND OTHERS . . . PLAINTIFFS;

AND

GEORGE DAY . . . . . DEFENDANT.

J. C. 1879 Nov. 12, 13.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Lands Act Amendment Act, 1875, *s.* 31—*Construction.*

The proviso to sect. 31 of the *Lands Act Amendment Act*, 1875 (which regulates the application by a Crown lessee to purchase lands comprised within his lease), enacts:

"Provided also that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease, or a proportionate quantity out of any holding of less area":—

Held, that according to the true construction thereof, a Crown lessee has a right of pre-emption of such square mile if it forms part of a block which is equivalent to an area of five miles square, *i.e.*, which contains an area of twenty-five square miles, irrespective of whether such block forms or contains a geometrical figure five miles square.

APPEAL from a judgment of the Supreme Court (March 22, 1878), by which it was ordered that the verdict found for the Appellants be set aside, and the verdict entered for the Respondent.

On the 8th of September, 1877, an action of trespass was commenced in the Supreme Court, and on the 14th of February, 1878, a verdict by consent was found for the Appellants, with forty shillings damages, but subject to the opinion of the Supreme Court sitting in banco, upon a special case to be settled between the parties.

On the 18th of February, 1878, the following special case was accordingly filed in the Supreme Court:—

"This action is brought to recover damages for trespasses committed by the Defendant upon certain lands situate on the *Yarrabee Run* in the district of *Murrumbidgee*, in the colony of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

J. C. 1879

ROBERTSON v. DAY.

New South Wales, of which run the Plaintiffs are the lessees from the Crown.

"To this action the Defendant has pleaded that as to part of the lands trespassed on, he is entitled to such lands by virtue of certain conditional purchases from the Crown under the 13th section of the *Crown Lands Alienation Act* of 1861, made on the 19th day of October, 1876, and as to the rest of the lands has paid nominal damages into Court.

"The *Yarrabee Run* consists of 42,240 acres, and is delineated on the plan hereto annexed, drawn according to the scale therein laid down, of which 28,894 acres are Crown lands under lease to the Plaintiffs.

"The Plaintiffs being such lessees, on the 17th day of October, 1876, delivered to the land agent at *Urana* (that being the proper office) an application to purchase 640 acres of land on the *Yarrabee Run* under the 31st clause of the *Lands Act Amendment Act* of 1875, at the same time tendering the sum of £640, which application was refused by the land agent, who indorsed on the same the following memorandum of refusal: 'Refused, not being within a block of five miles square of leasehold. Applicant advised. Tendered with Deposit, £640.'

"The said run does contain several areas equal to an area of five miles square, but each of such areas contains some portion of purchased land; and no area of five miles square can be found on the said run which does not include some portion of purchased land.

"The Defendant, on the 19th day of October, 1876, made application to the land agent at *Urana* (being the proper office) for the conditional purchases in the plea mentioned.

"It is admitted that the application by the Plaintiffs and the Defendant respectively were right in form, and in due accordance with the several Acts of Parliament.

"It is contended for the Plaintiffs that the land selected by Defendant was land lawfully contracted to be granted in fee simple to the Plaintiffs, and therefore not open to conditional purchase.

"The Defendant contends that the land was not so contracted to be sold by reason of the land applied for by the Plaintiffs not

coming within the provisions of the 31st clause of the *Lands Act Amendment Act* of 1875.

"The question for the opinion of the Court is, Whether the said land so applied for by the Plaintiffs could be purchased by them under the provisions of the 31st clause? If the Court should be of opinion that the above question should be answered in the affirmative, the verdict entered for the Plaintiff shall stand, if not, the verdict for the Plaintiff to be set aside, and a verdict entered for the Defendant."

On the 22nd of March, 1878, the Supreme Court (*Hargreave* and *Fawcett*, JJ., *Martin*, C.J., dissenting), made the order appealed from.

Mr. *Watkin Williams*, Q.C., and Mr. *Salomons*, for the Appellants, contended that on the true construction of sect. 31 of the *Lands Act Amendment Act*, 1875, it is not required that the area of the land purchased should be in the form of a block five miles square, but that it is sufficient if the whole extent of the area be more than or equal to five miles square.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The appeal under consideration arises in this way: The Plaintiffs are the lessees of a run of pastoral land in the Colony of *New South Wales*, and they bring an action of trespass against the Defendant for unlawfully entering a portion of the land within the limits of their lease. Their case is that they, in pursuance of powers given by the local Legislature, had duly acquired the rights of persons to whom the Government had contracted to sell a certain area of 640 acres of land within their run, and that the Defendant wrongfully entered it. The Defendant contends that although the Plaintiff had, as is admitted, given the proper notice and taken all the requisite steps to obtain pre-emption of the land in question, that land had ceased to be subject to the right of pre-emption; and that he, the Defendant, had obtained it as a free selector under the provisions of the local Acts. It is admitted

J. C. 1879

ROBERTSON v. DAY.

that if he had the right to do this he has taken the requisite steps to complete his title.

On the trial a verdict was taken by consent for the Plaintiff, subject to a special case on which the question raised for the decision of the Court was whether the land applied for by the Plaintiffs could be purchased by them. After the argument of the special case, the Supreme Court directed the verdict entered for the Plaintiff to be set aside, and a verdict to be entered for the Defendant. The Court was divided, the Chief Justice being in favour of the Plaintiff, and the two Puisne Judges on the part of the Defendant. From this decision the present appeal is brought.

The question arises entirely upon the construction of one section of one of the Colonial Acts.

Before considering this, it may be well to state shortly the course of the precedent legislation in the colony in this matter.

In the year 1861 the *Crown Lands Alienation Act* was passed, which established a code of laws in supersession of those which had been in force under Orders in Council. It may be enough to say that the scope of the legislation was to enable the Crown to grant leases of waste lands, afterwards called Crown lands, and that the greater part of the lands of the colony were so leased; that it was nevertheless allowable to any person whatever to select upon these leased lands any portion not exceeding 320 acres for conditional purchase, and to purchase it if he complied with the conditions. On the other hand, with a view to the protection of the Crown lessees, powers were given to them of pre-emption in respect of a limited part of the lands under lease. The 7th section of the Act empowers the lessee "to exercise a pre-emptive right of purchase over one portion and no more of an area not exceeding 640 acres out of each block of 25 square miles, and at a value to be determined by appraisement." The relation of 640 acres to 25 square miles appears there to be recognised by the Legislature. A further power is given to the Crown lessee to purchase by way of pre-emption any lands on which he has effected improvements, each purchase being limited to 320 acres; there being apparently no limit to the number of such purchases. Another Act, called the *Crown Lands Occupation Act*, passed at the same time, contained various provisions with

respect to the granting of Crown leases; and it may not be immaterial to observe that the ordinary extent of lease is there stated to be an area of twenty-five square miles, although there is a power under certain circumstances for the Government to extend that area to an area not exceeding 100 square miles; and that although it is provided that these areas should be, as far as convenient, of a rectangular shape, nevertheless this provision is subject to many exceptions arising from the configuration of the ground and other considerations.

In the year 1875 an Act was passed, amending the former Acts, and undoubtedly the object of this Act appears, among other things, to have been to give additional encouragement and protection to the Crown lessees. The quantity of land which they are enabled to purchase in respect of improvements thereon is increased, and then comes the 31st section upon which the whole question turns. In order to understand this section it must be borne in mind that as the law then stood it was in the power of a free selector, as he was called, to select lands upon which improvements had been partially made, though not completed, greatly to the detriment of the Crown lessee. The object of this section appears to have been to give protection against any such free selection to the Crown lessee for at least twelve months, by enabling him to purchase land upon which he intended to make, but had not actually made, improvements upon his making a certain deposit and complying with certain conditions. The words of the section are these:—"If any person holding any Crown lands under a lease or promise of lease for pastoral purposes shall deliver to the land agent of the district an application in writing for liberty by reason and in virtue of improvements intended to be made thereon to purchase any area of such land not exceeding 640 acres nor less than 40 acres, describing as may be required by any regulations hereunder the boundaries of the same which shall be subject to the several provisions of the *Crown Lands Alienation Act* of 1861, and of this Act, and setting forth the intended improvements, and shall also at the same time pay to the said land agent a sum of money equal to one pound per acre on the area so applied for, such land shall for the period of one year from the date of such application be held to be land lawfully contracted

J. C. 1879 ROBERTSON v. DAY.

to be granted in fee simple, and as such not open for conditional sale by selection, or by auction; and upon completion, to the satisfaction of the minister, of improvements to the value of one pound per acre on the land so applied for, a grant in fee simple of such land shall issue to the person so applying, or his legal alienee or representative, at the appraised value. Provided that if the said improvements shall not be so made, 25 per cent. of the deposit shall be forfeited and the balance refunded, and the said land shall be and become Crown land within the meaning of the *Crown Lands Alienation Act*, 1861." Here follows the proviso upon the construction of which the whole case depends: "Provided also, that no such application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease or a proportionate quantity out of any holding of less area."

It is contended on behalf of the Defendant that the Plaintiff had a right to pre-emption of 640 acres, or one square mile, only if it formed part of a block which was a geometrical square containing an area of 25 square miles. On the part of the Plaintiff it is contended that he was able to purchase the square mile if it formed part of a block which though not a precise square, contained an area of 25 square miles. It is admitted that there was not in the Plaintiff's run any block of land in which a geometrical figure could be drawn five miles square, the whole consisting of Crown lands, no portion of which had been purchased; it is admitted, on the other hand, that a figure comprising more than 25 square miles, consisting wholly of Crown lands, might be drawn if the figure need not be a geometrical square.

In considering this question, it is in the first place desirable to look at the previous legislation, the surrounding circumstances, and what may be called the reason of the thing. It has been shewn that 25 square miles was the ordinary size of a Crown lease, although that size might be extended. It has not been contended, and probably could not be, that the area comprised in any of these leases forms a precisely square geometrical figure, although no doubt it was considered desirable that it should be rectangular as far as circumstances permitted. If therefore the construction of the Defendant be adopted, it follows that in runs of the ordinary

size no power existed on the part of the Crown lessee to avail himself of this section, and the section would be in a great measure rendered nugatory. But further it has been pointed out that even with respect to runs of a larger size it would be easy for free selectors by making selections here and there in the run to prevent any square figure being drawn in it, consisting wholly of 25 square miles of Crown lands. Their Lordships, therefore, cannot shut their eyes to the consideration that the construction on the part of the Defendant would render practically inoperative a clause doubtless intended for the benefit and protection of Crown lessees. It is further to be observed that in the previous legislation of 1861, which may be treated as *in pari materiâ*, the Legislature has given a power to the Crown lessee to purchase an area—the same area as here described as 640 acres—out of a block defined as 25 square miles, the extent of area of the block, and not the precise configuration of it, being there considered the important matter.

From these considerations it appears more probable that the Legislature intended that which the Plaintiffs maintain to be the true construction of the statute; at the same time, this construction ought not to be adopted if the words of the Act are clear and unambiguous, and exclude such a construction. Upon a careful consideration of the words, their Lordships are of opinion that such a construction is not excluded. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. It appears to their Lordships that the concluding words of the proviso—"or a proportionate quantity out of any holding of a less area"—point to the conclusion that the Legislature had in their contemplation rather the question of area than the question of geometrical symmetry, and that when they used the expression "within each block of five miles square," they really intended to convey the same meaning which they had expressed in the clause *in pari materiâ* in the Act of 1861, though using a different form of expression. It is doing no violence to language to read the words as if slightly elliptical, and as if they were "within each block of an area of five miles square," or "within each block equivalent to an area of five miles square." To adopt this inter-

J. C. 1879 ROBERTSON v. DAY.

pretation—which amounts to no more than supposing that the Legislature used the language in question in its popular rather than in its strictly mathematical sense, and as expressive of area rather than of geometrical symmetry—is to reconcile the two portions of the proviso otherwise in conflict, to give effect to the whole clause, to make it consistent with previous legislation and with what may reasonably be supposed to have been the intention of the Legislature.

For these reasons their Lordships have come to the conclusion that the Chief Justice was right, and they will humbly advise Her Majesty that the judgment of the Court below be reversed, and that the verdict for the Plaintiff in this action stand. The Appellant should have the costs of this appeal.

Solicitors for Appellants: *Parker & Clarke.*

[PRIVY COUNCIL.]

J. C.* 1879 *Nov.* 15, 18, 19.

W. H. PEARSON, AND OTHERS, COMMISSIONERS OF THE WASTE LANDS BOARD OF SOUTHLAND, AND G. B. MORISON, AND OTHERS . . . . . } DEFENDANTS;

AND

RICHARD SPENCE . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL, AND FROM THE SUPREME COURT OF NEW ZEALAND.

Southland Waste Lands Acts of 1865 *and* 1867—*Construction—Rights of Purchaser—Jurisdiction of Commissioners.*

On the 25th of June, 1873, the Respondent applied to the Appellant Board for the purchase of a certain piece of land in terms of the *Southland Waste Lands Act* (29 Vict.), sect. 26, *i.e.*, at a price of £1 per acre.

On the 27th of June, the application was lodged, received and filed by the Board at a meeting.

On the 9th of July, the price was raised by an order of the Governor in Council (in terms of the Act), from £1 to £3 per acre.

On the 1st of August, 1873, the application was granted, and subsequently

---

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

the purchase-money, calculated at £1 per acre, was paid, and a certificate of receipt was granted.

On the 25th of May, 1876, the *M.* Appellants applied to the Board to purchase the same land, and on the Respondent opposing such application, the Board stated a case for the opinion of the Supreme Court, and determined, in accordance with such opinion, that the Respondent was not entitled to the land at less than £3 per acre, and that, he not having paid the same, the *M.* Appellants were entitled to have their application granted.

To a declaration in an action brought by the Respondent stating the above facts and praying for a declaration of title, injunction, and general relief, it was demurred (1) that it appeared that the Respondent was not entitled to be declared the purchaser; (2) that the action did not lie against the Board.

Held, that the demurrer cannot be maintained.

The Respondent's application must be construed as one to purchase at the price fixed by the Act at the date thereof, and not at any price to which it might thereafter be raised; the effect of the Board's decision was to grant the application in its entirety, *i.e.*, at £1 per acre; and there being then no other applicant, and no grounds for refusal as referred to in *Southland Waste Lands Amendment Act*, sect. 29, the Respondent had a right to have his application granted. Further, the decision of the Board on the application of the *M.* Appellants, after it had granted the Respondent's application, that, nevertheless, he was not entitled to the land was without jurisdiction, and therefore the Respondent was not put to his appeal under the Act, but had a right to maintain the action.

APPEAL from a judgment of the Court of Appeal (Dec. 6, 1877), whereby the demurrer of the Appellants to the Respondent's declaration was over-ruled with costs. The questions decided in the appeal turned upon the construction of the *Southland Waste Lands Act* 1865 (29 Vict. No. 59), and the *Southland Waste Lands Amendment Act*, 1867 (31 Vict. No. 64).

The pleadings are sufficiently set forth in the judgment of their Lordships.

In the Court below *Prendergast*, C.J., and *Gillies*, J., held that the Board of Commissioners, having administrative as well as judicial functions to perform, could be restrained by injunction against its administrative acts, that the question between the rights of the contending applicants was not within the jurisdiction of the Board, and that the Respondent having completed his application before the price of the land was raised, was entitled to be the purchaser at £1 per acre. *Williams*, J., on the other hand, held that the Respondent had no vested right to be declared the purchaser until his application had been actually granted by the

J. C. 1879

PEARSON v. SPENCE.

Board; and that he had therefore no right to purchase at the lower rate.

Mr. *Leith*, Q.C., and Mr. *Collyer*, for the Appellants, contended that there was no contract between the Crown and the Respondent until the acceptance by the Board of the Respondent's application, and that acceptance not having been made till the 1st of August, 1873, the contract was either at £3 per acre, or the parties were not *ad idem*. The vested right of the purchaser does not commence, nor has he any equitable estate, until payment of the purchase-money: *Archer* v. *Brittan* (1); *Russell* v. *Sealy* (2); *Powdrell* v. *Sealy* (3). The Respondent accordingly was not entitled to be declared the purchaser at £1 per acre. Reference was made to *Bell* v. *The Receiver of Land Revenue* (4). No action lies nor can any injunction issue against the Board in respect of its exercise of its judicial functions. The Respondent might have proceeded by mandamus in 1873 to compel the Receiver of Land Revenue to accept his purchase-money at £1 per acre. His remedy (if any) under sect. 4 of the *Waste Lands Board Appeal Act*, was anticipated by the Board stating a case, under sect. 6, for the Supreme Court; and no injunction lies to restrain the Board from acting on the decision so obtained. The only remedy against the Board as regards its judicial functions is by prohibition; and the ministerial functions of the Board do not commence until the proper price has been paid for the land.

Mr. *J. D. Wood*, and Mr. *Henderson*, for the Respondent contended that his right as purchaser depended upon statute rather than upon contract; otherwise the offer was made by the Government by advertisement, and the acceptance by the Respondent was made by his application to purchase in terms of the advertisement, *i.e.*, at the price therein mentioned of £1 per acre, and not at any price to which the Government might choose to raise it. Reference was made to *Williams* v. *Carwardine* (5); *Spencer* v. *Harding* (6); *Denton* v. *Great Northern Railway Company* (7).

(1) 2 (N. Z.) App. Cas. 294.
(2) Ibid. 498.
(3) Ibid. 394.
(4) 1 App. Cas. 707.
(5) 4 B. & A. 623.
(6) Law Rep. 5 C. P. 563.
(7) 5 E. & B. 860; 25 L. J. (Q.B.) 134.

The statutory right, however, is the higher right: see *Blackwood* v. *London Chartered Bank* (1), and the judgments in the Court below in *Bell* v. *The Receiver of Land Revenue* (2). The Order of Council could not affect the price of land already applied for: see sect. 26 of the Act of 1865. As regards the liability of the Board to action or injunction, the acts complained of are ministerial and not judicial; the jurisdiction over the Respondent was spent when his application was granted.

Mr. *Leith*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The question in this case arises upon demurrer to a declaration. The Plaintiff *Richard Spence* sued the Commissioners of the Waste Lands Board in the district of *Southland*, in the colony of *New Zealand*, and also certain persons of the name of *Morison*.

The substantial allegations of the declaration are as follows:— The Plaintiff states that "In pursuance of and in accordance with the laws then in force relating to the sale and disposal of the waste lands of the Crown," he, on the 25th day of June, 1873, applied to the Defendants, the Commissioners, for a certain piece of land, and in accordance with the regulations entered and signed his name in the book known as the application book, and delivered to the clerk a written application in this form:— "Application for rural land in the province of *Southland*, *New Zealand*. To the Commissioners of the Waste Land Board for the province of *Southland*. I hereby apply to purchase in terms of the *Southland Waste Lands Act of* 1865, the land described in the schedule," and so on. He proceeds to allege that at a meeting of the Board on the 27th of June, 1873, upon the appearance of the Plaintiff, his written application was opened and read in the presence of the Commissioners, and was filed in the records and minutes of the office, and a minute or entry was made in the words which he sets out. Then he avers: "Although the Plaintiff's said application was received, opened,

(1) Law Rep. 5 P. C. 110. (2) 2 Court of App. (N. Z.) 508.

J. C. 1879 PEARSON v. SPENCE.

and filed as aforesaid on the 27th day of June, 1873, and although there then existed no good reason, either in law or fact, why the application of the Plaintiff should not be allowed and granted, the Commissioners of the said Board adjourned its consideration to a future day." That pending the adjournment, namely, on the 9th day of July, 1873, an order was made by the Governor in Council, in pursuance of the powers given him by the *Southland Waste Lands Act*, 1865, raising the price of the land from £1 an acre, which it had been at the time of the application, to £3. He goes on to aver that after being pressed to decide the case on many occasions, on the 1st of August, 1873, the Waste Lands Board, sitting publicly at a place mentioned, resolved that the Plaintiff's application should be granted, and caused a minute to be entered of its decision to that effect in the record books kept by the Board. He further avers that on the 1st day of August, 1873, and after the decision of the Board, the Plaintiff applied to the Waste Lands Board for an order upon or authority directed to the Receiver of Land Revenue for the district of *Southland* aforesaid, authorizing, directing, and empowering him to receive the purchase-money payable by the Plaintiff upon and in respect of the said parcel of land, and the said Waste Lands Board thereupon issued and delivered to the Plaintiff two blank forms of receipts to be tendered by the Plaintiff to the said Receiver of Land Revenue in the words and figures following:—"No. 913. Office of Receiver of Land Revenue, *Invercargill*, 1st August, 1873. Received from *Richard Spence*, per *K. McIvon*, the sum of one thousand and sixty pounds sterling, being payment on application for land 1,445, section 176, *Taringatura* district 1060. No. 194. Office of Receiver of Land Revenue, *Invercargill*, 1st August, 1873. Received from *R. Spence*, per *K. McIvon*, the sum of thirty-seven pounds ten shillings sterling, being deposit for survey of application 1445 *Taringatura* district, £37. 10s. 0*d*." Then he avers: "The Plaintiff tendered to *Alexander Jamieson Ellis*, Esquire, of *Invercargill* aforesaid, the then Receiver of Land Revenue for the district of *Southland*, the sums mentioned in the said forms of receipt, but the said Receiver refused to accept payment thereof, upon the ground that the price of land in the said district of *Southland* had been by the Order of Council herein-

before mentioned raised from £1 to £3 an acre, and that consequently the Plaintiff was legally compelled to pay the said price of £3 an acre, which the Plaintiff then refused to do." Then the declaration goes on to state that, "Afterwards the Superintendent of the Province of *Otago*, under the powers conferred by the 2nd section of the *Southland Waste Lands Act Amendment Act*, 1873, appointed Commissioners to classify the unsold Crown lands in the said district of *Southland*, and under the classification afterwards made by such Commissioners the lands previously applied for by the Plaintiff were classed and declared to be agricultural lands; and the report of the said Commissioners, duly approved of by the said Superintendent, was published in the *Otago Provincial Gazette*." Then, "On the 14th day of September, 1874, the Plaintiff personally presented to *Henry McCulloch*, Esquire, of *Invercargill* aforesaid, and the then Receiver of Land Revenue for the district of *Southland* aforesaid, the forms of receipt beforementioned, issued by the said Waste Lands Board, and the Plaintiff tendered to the said *Henry McCulloch* as such Receiver the sums of money mentioned and referred to in such receipts; and the Plaintiff says that the said *Henry McCulloch* as such Receiver of Land Revenue as aforesaid (although perhaps in ignorance of the previous refusal on the part of the said *Alexander Jamieson Ellis*) accepted the moneys so tendered, and signed the said receipts, which were thereupon delivered back to the Plaintiff. Some short time afterwards, the said *Henry McCulloch*, as such Receiver of Land Revenue as aforesaid, tendered to the Plaintiff the moneys so as aforesaid paid by him, upon the ground that they had been accepted in mistake, but the Plaintiff declined to receive back the moneys so tendered, insisting that he was entitled to the lands applied for at the price paid to the said *Henry McCulloch* as such Receiver as aforesaid." Then it is stated that the moneys were paid by Mr. *McCulloch* into the Treasury, and had been applied accordingly for public purposes. Then comes this further statement: "On the 25th of May, 1876, the Defendants, the *Morisons*, with knowledge of the Plaintiff's said application, applied to the Waste Lands Board of the district of *Southland* for a certain parcel of land. Such application, so as aforesaid made by the said *George Morison*, *John Morison*, and

J. C. 1879 PEARSON v. SPENCE.

Henry Bannerman Morison, came on to be heard in due course by the Waste Lands Board, and was opposed by and on behalf of the Plaintiff on account of his previously vested right; and the Defendants, sued as Commissioners of the said Waste Lands Board, thereupon resolved to state a case for the opinion of the Supreme Court in order to ascertain and determine whether the Plaintiff had acquired a vested interest in the said parcel of land of 1060 acres at the price of £1 an acre, and whether the said Board could in consequence of the said Plaintiff not having paid or tendered the sum of £3 an acre for the said land, treat it as open for sale, and whether the said Defendants, *George Morison*, *John Morison*, and *Henry Bannerman Morison*, were entitled to be declared the purchasers." A case was accordingly stated by the said Waste Lands Board for the opinion of the said Supreme Court, and judgment was on the 15th day of August, 1877, delivered thereon by His Honour Mr. Justice *Williams*, one of the Judges of the said Court, who determined (or advised the said Board) that the Plaintiff was not entitled to have the land applied for by him at less than £3 sterling an acre. Such price not having been paid or tendered, the land was again open for sale, and the Defendants, *George Morison*, *John Morison*, and *Henry Bannerman Morison*, were entitled to have their said application granted." The Plaintiff then alleges that "the *Morisons* will now apply for and insist that their said application should and ought to be granted, and the Plaintiff says that the Defendants, sued as such Commissioners, will grant the application." Then, after stating that prior to the making the publication of the Order in Council hereinbefore referred to, he had done and performed every act and condition necessary, and so on, and that he is ready and willing to perform and submit to whatever may be required of him by the Court, and so on; the declaration proceeds thus: "The Plaintiff fears and believes that unless restrained by the injunction of this Honourable Court, the Defendants will mutually combine to defeat him of his legal and equitable rights to the said parcel or block of 1060 acres of land, wherefore the Plaintiff prays—(1.) That it may be decreed and declared by this Honourable Court that he, the said Plaintiff, having performed every condition imposed by law necessary to entitle him to be declared the pur-

chaser at the price of £1 an acre of the said 1060 acres of land prior to the making and publication of the Order in Council in the declaration mentioned, is entitled to the said land as against the Defendants, the Messieurs *Morison*, and all other persons. (2.) That after the receipt of the purchase-money of £1 an acre in the declaration mentioned, the sale and disposal of the said 1060 acres passed beyond the control of the said Waste Lands Board. (3.) That in any event if the Plaintiff should be held not entitled to be declared the purchaser of the said lands at the price of £1 per acre, the said Waste Lands Board was not justified in receiving the application of the Defendants, *George Morison*, *John Morison*, and *Henry Bannerman Morison*, for the purchase of the said 80 and 180 acres, and ought not to grant the same. (4.) That if the price payable in respect of the purchase of the said 1,060 acres of land was more than £1 an acre, the Plaintiff should have the option of paying the higher price before any application hostile to the Plaintiff was entertained by the said Board. (5.) That the Defendants, *George Morison*, *John Morison*, and *Henry Bannerman Morison*, may be restrained by the injunction of this Honourable Court from further proceeding with their application to purchase the said parcels of 80 and 180 acres of land respectively, and that the Defendants, sued as Commissioners of the said Waste Lands Board, may be also restrained from entertaining or taking any step or doing any act, deed, or matter, or thing intended or calculated to give effect to the said application of the *Morisons*." And (6.) for general relief.

To this declaration there was a demurrer, and the points intended to be raised are thus stated: that—(1.) "No action lies against the Commissioners of the Waste Lands Board for not disposing of land or granting applications made for the purchase of land. (2.) The Commissioners having judicial functions to perform, cannot be sued for any decision given by them, unless corruption be alleged against them. (3.) The Commissioners cannot be sued for gross negligence. (4.) The Commissioners having obeyed, as they were by law bound to obey, the opinion of a Judge of the Supreme Court under the *Waste Lands Board Appeals Act*, 1867, are not liable to be sued for such obedience, and so on." Then there is this stated. "(7.) If the Plaintiff has

J. C. 1879 PEARSON v. SPENCE.

paid the purchase-money for his land and received receipts from the Receiver of Land Revenue the jurisdiction of the Commissioners of the Waste Lands Board is at an end. (8.) and (9.) It appears from the declaration that the Plaintiff is not entitled to be declared the purchaser of the land in the declaration mentioned," and that the Defendants, the *Morisons*, are entitled to purchase it.

On this demurrer being argued before the Court of Appeal, two questions were raised; the first being what may be called the question on the merits as to whether the Plaintiff was or was not entitled to the land on payment of £1 an acre; and the second being, whether, supposing the Plaintiff to have had this right and to have been deprived of it, he had sought the proper remedy. Upon the latter question the Court was unanimous in his favour. Upon the first question the Chief Justice and one of the learned Judges were of opinion that the Plaintiff was entitled to purchase the land at £1 an acre, the other learned Judge being of opinion that he was not entitled to purchase it at a less price than £3. It is from this decision that the present appeal is preferred.

The *Southland Waste Lands Act*, 29th Victoria, s. 26, is in these terms: "All lands not included in the foregoing regulations"—viz., certain regulations relating to town lands, public reserves, &c. —"shall be open for sale as rural land at the fixed price of £1 per acre. Provided always, that if at any time the superintendent and Provisional Council of the said province shall recommend the Governor to raise such price, then it shall be lawful for the Governor in Council, if he shall see fit, to raise such price in accordance with such recommendation." The Plaintiff made an application in pursuance of this section to the Commissioners who are constituted under this Act, and whose powers are defined principally in the 6th, 7th, 8th, 9th, 10th, and 11th sections, which are to the effect that a Board, to be called the Waste Lands Board, to consist of one Chief Commissioner and not less than three other Commissioners, shall be appointed and removable; that they shall sit at the principal land office; that all the meetings of the Board shall be attended by at least three Commissioners, and open to the public, and "all applications for land and for pasturage, and for timber licences, shall, after hearing evidence,

when necessary, be determined by the Board at some sitting thereof, and the Board shall have power to hear and determine all disputes between the holders of pasturage and timber licences respecting the boundaries of runs."

There is a subsequent Act of the 10th of October, 1867, the *Southland Waste Lands Act*, 1865, Amendment Act, No. 64, wherein, by sect. 29, it is enacted that, "Notwithstanding anything in the said Act to the contrary, no section or block of land shall be selected or taken so as, in the opinion of the Board, to render less available for sale or other disposal or injuriously to affect in value any other portion of the waste lands in the province; provided always, that in all cases wherein the Board may deem it advisable to withdraw from sale any block or section of land, or refuse to grant any application for such land, the reason or reasons for such withdrawal or refusal shall be recorded in the minutes of their proceedings."

It is material in the first place to determine what the application of the Plaintiff was. It appears to their Lordships that it was an application for the purchase of the land in question at the price of £1 an acre. It is true that the application does not state the price, but the applicant applies to purchase in the terms of the *Southland Waste Lands Act*, which declares that the land shall be open for sale at the fixed price of 20*s.* an acre, with a proviso that the Governor, under certain circumstances, may raise the price. Their Lordships think, therefore, that the application was to purchase the land at the price of 20*s.* an acre, that being the fixed price at the date of the application, and that to construe it according to the Defendant's contention as an application to purchase at any sum to which the ruling price might afterwards be raised would be a forced construction. The application was lodged, received, and filed by the Board on the 27th of June; and their Lordships may observe, in passing, that that distinguishes the case from *Bell* v. *The Receiver of Land Revenue* (1), which has been quoted, where the application had not been received or dealt with, or completely made at the time when the change of price was made. If on the 27th of June the Commissioners had granted the application, as in the ordinary course they would have done,

(1) 1 App. Cas. 707.

J. C. 1879 PEARSON v. SPENCE.

beyond all doubt the price would have been 20*s.* an acre. Afterwards the price was raised; but the Commissioners, after adjourning the consideration of the question upon grounds which it is not necessary to consider, came to a final determination on the 1st of August that the application should be granted, and they entered a minute of their decision.

What then was granted? It appears to their Lordships that the effect of the decision of the Board was to grant the application in its entirety, and the entirety of the application was to purchase the land at the price of £1 an acre. The contention on the other side must be that it was an acceptance of so much of the application as related to the purchase of the land, but not of so much as related to the price. Their Lordships are unable to accede to this distinction.

It appears to their Lordships that there being no other applicant for the land, and no grounds for refusal such as are referred to in the 29th section of the *Southland Waste Lands Amendment Act*, the Plaintiff had a right to have his application granted, and when it was granted it was granted in the terms of that application, one of which was to purchase at a price of £1 an acre. This view disposes of the main question in the case.

The next question which has been raised before their Lordships, but which does not appear to be very distinctly, or at least not in the same form, stated in the grounds of demurrer, is that inasmuch as the Commissioners decided upon a question within their jurisdiction, namely, that the Plaintiff had not paid the proper price for the lands, the only remedy is by appeal, and that this action will not lie. This question depends on the powers of the Commissioners, and upon the operation of certain Acts containing provisions with respect to appeals. The provisions with respect to appeals are contained mainly in the 4th section of the *Southland Waste Lands Amendment Act*, 1867, which is in these terms: "The decision of the Board on all matters to be by it heard and determined shall, subject to the right of appeal to the Superior Court as hereinafter provided, be final and conclusive. Provided always, that the Board may, on the application of any person, grant a rehearing of any case decided by it if it shall think that justice requires it, &c. There follows a power to grant

a case for the opinion of the Supreme Court, which is stated in the declaration to have been acted upon in this case, and some appeal clauses which would appear to be superseded by Act No. 67 of the same session, which contains an appeal clause to this effect: "If any person consider himself aggrieved by any decision of the said Board, such person may apply to the Supreme Court, provided such person shall within 30 days after the giving of such decision give notice of such appeal to the Board, and also to such persons, if any, as shall have appeared before the Board as opponents of the case or claim or application of such person, and also give security, to be approved of by the Registrar of the Supreme Court, for the cost of the appeal," and so on, "and after hearing the parties, the Court shall give its decision, and cause the same to be certified in writing by the Registrar or Deputy Registrar of the Court, to the Board, and the Board shall be bound to follow such decision, and shall reverse, alter, modify, or confirm their decision in accordance therewith, and the Supreme Court may make such order as to payment of costs to either party as to it shall seem meet." Then it goes on to say, "Such appeal shall be in the form of a case agreed on by such Board and the Appellant, and if they cannot agree on the case to be stated, then such appeal shall not be in the form of a case, but the Supreme Court shall hear such appeal and may receive evidence either orally or by affidavit, and it shall be lawful for the Supreme Court, if to the Court it shall seem fit, instead of deciding any matter of fact in dispute upon affidavit or personal examination by it of witnesses, to order any such question of fact to be found and determined by a jury."

The question arises, whether the Board, in deciding as they did that the Plaintiff had no title to the land because he had not paid £3 per acre purchase-money, did or did not act within their jurisdiction. If they acted within their jurisdiction it would certainly appear that their decision could only be questioned on appeal. It is true that the Board had a right to entertain—indeed were bound to entertain—the application of the *Morisons*, and so far as the *Morisons* were concerned, to decide whether or not the lands were waste lands which they were at liberty to grant to the *Morisons;* but it appears to their Lordships that the Board

J. C. 1879 PEARSON v. SPENCE.

had not jurisdiction on the application of the *Morisons* to decide as against the Plaintiff that he had not previously acquired a preferable title to the land. They had no jurisdiction to determine the price of the land. Their jurisdiction as against the Plaintiff was spent when they granted or refused to grant his application. But it is said that the Plaintiff by appearing before the Commissioners acknowledged their jurisdiction. Even if it were assumed that in such a case consent could give jurisdiction, their Lordships do not think that his appearance before the Commissioners is to be so interpreted; they interpret it as a protest on his part against their dealing with the claim of the *Morisons* on the ground that he, the Plaintiff, having himself acquired a title to the land, it could no longer be granted to another. It is true that the Commissioners would be entitled to inquire incidentally how and in what way he made out his title, but it appears to their Lordships that when he shewed that his application had been granted, and produced the certificate from the proper officer, acknowledging the payment of the purchase-money, the jurisdiction of the Commisssioners was at an end, and that they were not entitled to determine as against the Plaintiff, that nevertheless he had not a valid title. Indeed this view seems to be put forth to a certain extent by the Defendants in a portion of their demurrer, where they state that "if the Plaintiff has paid the purchase-money for his land and received receipts from the Receiver of Land Revenues, the jurisdiction of the Commissioners of Waste Lands is at an end." If the Commissioners had no jurisdiction to deal with the question of the Plaintiff's title, the submission by them of a case on the subject to the Supreme Court cannot of course affect the case. For these reasons their Lordships are of opinion that the Plaintiff is not put to his appeal, the jurisdiction of the Superior Court is not ousted, and the Plaintiff has a right to obtain a declaration of his title to the land. He has further a right to apply to the Court to restrain the *Morisons* from interfering with his rights or using legal process for that purpose.

But it has been further argued that even assuming the right to a declaration of title, and the right to restrain the *Morisons*, still no injunction can issue against the Commissioners to restrain them from hearing and determining any question which they

have power to determine judicially. Their Lordships observe that the question raised at present is upon general demurrer, and it is enough for the Plaintiff to shew that under the circumstances which he states he may be entitled to some relief; and inasmuch as the Commissioners are not merely a judicial body but are also an administrative body, performing many functions which are certainly not judicial, and many of which are merely ministerial, the declaration may be supported on the ground that at all events the Plaintiff shews a case under which he may be entitled to relief against some of the acts of a ministerial character which they are about to do for the purpose of perfecting the title of the *Morisons* as against him. It may be if the case comes on for hearing, that the injunction may be so far modified as to be confined to such acts, but considering the case as it arises upon demurrer their Lordships are unable to say that the demurrer on this ground is sustainable.

For these reasons their Lordships have come to the conclusion that this demurrer cannot be maintained, that the decision of the Court of Appeal is right, and they will humbly advise Her Majesty that the decision of that Court be affirmed, and that this appeal be dismissed with costs.

Solicitors for Appellant: *John Mackrell & Co.*
Solicitors for Respondent: *Rose & Fry.*

[PRIVY COUNCIL.]

J. C.* 1879 July 15, 16, 17, Nov. 22.

DAVID BELL . . . . . PLAINTIFF;

AND

THE CORPORATION OF QUEBEC . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

French Law in Quebec—Riparian Proprietors—Droit d'accès et de sortie—Navigable Rivers—Obstruction to Navigation—Damage.

In an action for damages and to obtain the demolition of a bridge constructed by the Corporation of *Quebec* across the Little River *St. Charles*, on the ground that the bridge obstructed the navigation of the river and thereby caused damage to the Plaintiff as the owner of riparian land; it appeared that another bridge existed a short distance higher up the river, that the river was tidal beyond the higher bridge, and navigable for boats, flats, and rafts, and that it was possible at exceptionally high tides to float barges as far as the higher bridge, but that the difficulties and risks which from natural causes attended the navigation of craft of this description were so great that the river in its present state did not admit of their use in a practical and profitable manner; that the small boats, flats, and rafts, could be navigated as before, unobstructed by the bridge, although masted barges could not pass it without lowering their masts; that the Plaintiff's land was situated between the two bridges and was used as a farm, but was not proved to have been depreciated in value by reason of the bridge complained of, and that the Plaintiff was not proved to have sustained damage from actual interruption of traffic.

Held, that although there may be "*droit d'accès et de sortie*," belonging, according to French law as it prevails in *Quebec*, to riparian land as to a house in a street which, if interfered with, would at once give the proprietor a right of action; yet this right is confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner; that such right had not on the evidence been violated; and that supposing the bridge complained of to cause some obstruction to the navigation, the action could not be maintained in respect of it without proof of actual and special damage.

Lyon v. *Fishmongers' Company* (1) considered.

Whether an obstruction amounts to an interference with a riparian pro-

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

(1) 1 App. Cas. 662.

prietor's access to his frontage, which is a private right by English as by French law, is a question of fact to be determined by the circumstances of each particular case.

According to French law the test of the navigability of a river is its possible use for transport in some practical and profitable manner.

APPEAL from a judgment of the Court of Queen's Bench (Sept. 8, 1877), affirming a judgment of the Superior Court (Nov. 8, 1876) which dismissed with costs the Appellant's action and demand.

This was an action *en démolition de nouvelles œuvres*, whereby the Appellant sought to procure the demolition and removal, and also damages occasioned by the erection of, a certain construction by the Respondent corporation over the River *St. Charles*, a tributary of the River *St. Lawrence*, for the purposes of the water-works of the city of *Quebec*.

The facts of the case are set out in the judgment of their Lordships.

The declaration, filed on the 3rd of August, 1874, contained a count for the nuisance and obstruction, prayed that the same might be demolished and removed, and claimed $40,000 damages. The Corporation pleaded the general issue, and by *exception péremptoire en droit perpetuelle* set out several statutes (Provincial Statute of *Canada*, 10 Vict. c. 113, s. 28, amended by 13 & 14 Vict. c. 100, and 29 Vict. c. 57, s. 36, sub-s. 35) granting them permission to erect works for the purpose of supplying water to the City of *Quebec*, and for that purpose granting them power to expropriate property. It also pleaded that there had been no notice of action under Art. 22 of the Code of Civil Procedure, and a prescription of six months under the said statutes. The Appellant joined issue on these pleas.

On the 8th of November, 1876, the Superior Court (*Dorion*, J.) considering that the Plaintiff had not proved that the works complained of had caused any damage or prejudice to the Plaintiff, or were of a nature to cause him any such in future; and considering that the only damages which the Plaintiff had attempted to prove were future, uncertain, and inappreciable; and considering that the said works did not in any way prejudice the Plaintiff in the enjoyment and possession of the immoveable property described in the

J. C. 1879

BELL v. CORPORATION OF QUEBEC.

said declaration ; and finally considering that for the above reasons the action of the Plaintiff was not sustainable, dismissed the same with costs.

The Court of Queen's Bench (*Dorion*, C.J., *Monk* and *Tessier*, JJ., *Ramsay*, J., dissenting) on the 8th of September, 1877, affirmed the judgment of the Superior Court upon the grounds given by that Court.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellant :—

The evidence shews that the River *St. Charles* was navigable and tidal opposite the Appellant's property before the construction of the bridge in question, and that the bridge obstructs and impedes the navigation. It was navigable for laden "*bateaux*" as far as *Scott's Bridge* before the erection of the works in question, and it appeared that "*bateaux*" of upwards of sixty tons fully laden did from time to time ascend the river as far as that point and discharge their cargoes, sometimes on the Appellant's property and sometimes at *Scott's Bridge*. The Appellant, a bottle and earthenware manufacturer, had brought up in the course of his business several of the "*bateaux*" laden with coals, clay, and other materials to be used at his works. The *Quebec* Harbour Commissioners were shewn to have spent a large sum of money in improving the navigation of the river, which opposite the Appellant's property varied from 175 to 206 feet in width.

Then as to the question what is in law deemed to be a navigable river, reference was made to *Miles* v. *Rose* (1). The navigability of a river does not in law depend upon the extent of the user ; it is none the less a navigable river because it may be difficult and expensive to secure and improve its navigability. It makes no difference whether a river is navigable all the year round or only at short intervals with respect to its character as a navigable river.

The statutes relied upon by the Respondent did not confer, and even if they purported to do so could not confer, any right upon the Respondents to obstruct or impede the navigation of the river: see *The State of Pennsylvania* v. *The Wheeling and Belmont*

(1) 5 Taunt. 705.

Bridge Company (1). With regard to damage, assuming the navigability of the river, the evidence shewed that the bridge was an obstruction.

By the law of *England* the presumption is that above the tide the river is private property, but that below the tide it is public property. [Mr. *Bompas*:—By French law the presumption is different.] Whatever use can be made of a public river in its natural state belongs to the public and cannot be obstructed: see *Angell* on Watercourses [6th Ed. 1869], § 537. The Appellant's damages were proved to be that his property was cut off from the navigation of the river by the bridge in question, and that the value of his land had been seriously diminished, and his communication with the city of *Quebec* cut off, and that he was and would thenceforth be obliged at considerable expense to carry by carts all goods required by him in his business: *Rose* v. *Miles* (2). Independently, moreover, of his right as one of the public to the free use and navigation of the river, entitling him on infringement thereof to recover special damages, the Appellant has a private right as riparian proprietor, and in respect thereof can maintain an action for its infringement without proof of actual, and still less of special or peculiar damage.

Reference was made to *Angell* on Watercourses, c. 13; *Hall* on Sea-shore, appendix, p. 5; *Hale's* Treatise, c. 3, "Concerning public streams;" *Hale*, c. 1, "Concerning the interest of fresh rivers;" *Beckett* v. *Midland Railway Company* (3), judgment of *Willes*, J.; *Metropolitan Board of Works* v. *M'Carthy*, judgments of Lords *Cairns* and *Penzance* (4); and *Lyon* v. *Fishmongers' Company* (5).

Mr. *Bompas*, Q.C., and Mr. *Rigby*, for the Corporation of *Quebec*:—

In reference to *Lyon* v. *Fishmongers' Company*, which was an English case decided by English law, the House of Lords attributed to riparian proprietors *quâ* owners larger rights than those of access to the waterway; it went further than the French law,

(1) 13 Howard Sup. Ct. Rep. 518.
(2) 4 M. & S. 101.
(3) Law Rep. 3 C. P. 82.
(4) Law Rep. 7 H. L. 243.
(5) 1 App. Ca. 662.

J. C. 1879 BELL v. CORPORATION OF QUEBEC.

which prevails in *Quebec:* see *Brown* v. *Gugy* (1). See further *Montreal* v. *Drummond* (2) and passages of *Demolombe* there cited. See further what took place in the lower Court in *Lyon* v. *Fishmongers' Company* (3). The question in that case was entirely one of access from the property to the river. Concurrent judgments of the Courts below have found that the Appellant had failed to shew that he had sustained or would sustain any injury from the Defendants' works; and without such proof this action is not maintainable. The local Acts 10 Vict. c. 113, since repealed, and 29 Vict. c. 57, a consolidation Act (with but little alteration), empowered the corporation to construct these works: see sect. 36 of the later Act. Even if the river were a navigable one, the corporation was only exercising its statutable rights, subject it may be to compensation to be awarded under the Act, but is not liable to be sued as a wrongdoer or to be called upon to take down the works complained of: see *Montreal* v. *Drummond* (2) and *Hawley* v. *Steele* (4). Further, the river is not a navigable one, *i.e.*, is not usable on the evidence for purposes of commerce: see *Dalloz, Répertoire, tit.* "*Eaux,*" No. 39; *tit.* "*Voirie par eaux,*" 52, 53. This river was neither navigated nor navigable; and consequently the bridge complained of causes no obstruction. The flow and reflow of the tide raises only a presumption of navigability: see *King* v. *Montague* (5).

Mr. *Benjamin,* Q.C., replied.

1879 Nov. 22.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from the judgment of the Court of Queen's Bench for the province of *Quebec,* which affirmed the judgment of the Superior Court of the Province, dismissing the Appellant's action.

The action was brought for damages, and to obtain the demolition of a bridge, constructed by the corporation of *Quebec,* across the Little River *St. Charles,* a tributary of the *St. Lawrence,* on

(1) 2 Moore, P. C. (N. S.) 341, 357.
(2) 1 App. Cas. 384.
(3) Law Rep. 10 Ch. 689, 691.
(4) 6 Ch. D. 521.
(5) 4 B. & C. 598.

the ground that the bridge obstructed the navigation of the river, and thereby caused damage to the Appellant, as the owner of riparian land.

The bridge was built to carry an aqueduct, and formed a part of the works constructed by the corporation to carry water to *Quebec* for the use of the inhabitants.

The corporation was authorized to construct works for this purpose by an Act of the Legislature of *Canada*, 29 Vict. c. 57 (which was passed before the *British North America Act*, 1867). These powers are found in sect. 36 of the Act.

The place where the bridge complained of has been built is about two miles above *Quebec*, and a short distance only below another bridge crossing the *St. Charles*, called *Scott's Bridge*, constructed by the Government more than fifty years ago.

The Appellant's land lies on the south bank of the river between these two bridges, and is used for agricultural purposes. He and his brother, as partners, own land about half a mile above *Scott's Bridge*, where they carry on the business of potters, and have a pottery and clay pipe manufactory. The Appellant originally based his claim on the ownership of these works, as well as of the land below *Scott's Bridge*, but his claim in respect of the former was not insisted on at their Lordships' Bar, and the right to maintain the action was rested solely on his ownership of the land below *Scott's Bridge*.

The Court of Queen's Bench appears to have doubted whether the statute above referred to, though it authorized the construction of waterworks, which might be brought across the *St. Charles* would, if the action were otherwise maintainable, afford a sufficient defence to it, so far as it claimed damages. Mr. Justice *Tessier* was of opinion that it would be an answer to the claim for the demolition of the bridge.

The questions on which the decision below turned, and which were those principally argued upon the appeal, are, 1, whether and in what degree the river is navigable at the place where the bridge has been built; 2, whether the Appellant has sustained special damage from its construction; and, 3, whether, without proof of such damage, the action is maintainable.

The river is tidal for some distance above *Scott's Bridge*, and is

J. C. 1879

BELL v. CORPORATION OF QUEBEC.

navigable for small boats and flats, and for rafts up to and beyond this bridge; but that it is navigable, in a practical and commercial sense, for larger craft, such as barges (*bateaux*), above the place where the bridge has been built, is controverted, and a great conflict is found in the evidence given at the hearing on this point.

The general character of the river at this place may be thus described,—numerous shoals exist in it, its bed is studded with rocks or boulders, which are a source of danger to any craft which may ground upon it, very high tides happen twice in the year, caused by the melting of the snow in spring, and by the rains in autumn, and it is only at the times of these extraordinary tides that barges can at all ascend the river, and then not without difficulty and danger of grounding. The proof of the actual employment of barges in this part of the river is very much what might be expected from this description. Throughout the period of twenty-seven years to which the evidence extends, a rare and intermittent use only has been shewn. Although numerous witnesses were called on the part of the Plaintiff, the instances spoken of were very few, with intervals of many years between them. In most of the cases the barges were said to have been brought up to the *Corporation Road*, which is just above the new bridge. Of those so brought up, about eight or ten were said to have conveyed clay and stores for Messrs. *Bell*, which were carted from the *Corporation Road* to their potteries above *Scott's Bridge*. For some years before the building of the bridge no barges appear to have gone above the place where it stands, and it was contended for the Defendants that the inference from these facts was that the employment of barges on this part of the river was neither useful nor profitable, and had practically been abandoned. It was attempted to account for the want of use of this part of the river by the fact of a strike of the bargemen, but this appears to be an insufficient explanation of it. On the part of the Defendants, numerous witnesses of good position and of great local experience, including the harbour master of *Quebec*, owners of barges, shipbuilders, and others, who lived on the banks of the river, or had business there, deposed that the river at and above the spot in question was not navigable for barges on account of the difficulties and dangers of the passage, and that in point of fact these vessels

were not on this account employed to navigate it. Barge owners gave evidence that they would not allow their barges to make the passage, and declared that they could not be safely or profitably employed in that part of the river.

There was evidence to the effect that the bridge offered no obstruction to the passage of small boats, flats, and rafts, and the obstruction complained of principally was that barges with masts (which most of the *Quebec* barges carried) could not pass under it without striking or lowering their masts.

The Judge of the Superior Court based his judgment dismissing the suit upon the following *considérants* :—

"*Que le Demandeur n'a pas prouvé que les constructions faites par la Défenderesse sur la Rivière St. Charles, en vertu des pouvoirs à elle conférés par la loi, aient causé aucun dommage ou préjudice au dit Demandeur, ou soient de nature à lui en causer à l'avenir.*

"*Que les seuls dommages que le dit Demandeur ait cherché à prouver sont des dommages futurs, incertains et inappréciables.*

"*Que les dites constructions faites par la Défenderesse ne troublent en aucune manière le Demandeur dans sa jouissance et possession des immeubles décrits en la déclaration en cette cause.*"

Upon appeal to the Court of Queen's Bench, Chief Justice *Dorion*, after discussing the evidence and some French authorities on the subject, declared that all the circumstances led him to adopt the opinion of the witnesses who considered that the river was not navigable at the place where the bridge is built; but he was further of opinion, supposing the river to be navigable, that the Plaintiff had given no sufficient proof of actual or special injury from the construction of the bridge, which entitled him to maintain his action for its demolition or for damages.

Mr. Justice *Tessier* thought that the evidence of the most competent of the witnesses proved that this part of the river was not navigable in the true sense of the word, that it was "flottable" for small boats and rafts only, and that it was as much so since the construction of the bridge as before. He also agreed with the Chief Justice that, if the river was to be deemed navigable, the Plaintiff had not proved that he had sustained damage. Mr. Justice *Ramsay* dissented from his colleagues on both points,

J. C. 1879

BELL v. CORPORATION OF QUEBEC.

but stated that the Plaintiff's actual damage appeared to him to be very small.

The decision in this case is to be governed by the French law, as it prevails in the province of *Quebec*.

In the authorities referred to by the Judges below, and those cited at their Lordships' bar, the subject of navigable rivers is discussed principally with a view to determine the question whether a particular river is or is not to be considered the domain of the Crown. The definitions attempted to be given are often vague, and sometimes contradictory.

In *Dalloz* (*Rép.* tit. "*Voirie par eau*") it is stated, No. 52:—

"*Il ne suffit pas pour qu'une rivière soit réputée navigable qu'elle soit en quelques points de son cours susceptible de porter bateaux; il faut qu'il puisse s'y établir une navigation régulière; que l'on puisse y naviguer librement, y circuler en bateaux, trains et radeaux, au moins pendant une partie de l'année.*"

At the end of the paragraph he says,—

"*En d'autres termes, la seule possibilité de naviguer sur un cours d'eau n'emporte pas pour le public le droit de naviguer; il faut possibilité et permanence dans une certaine mesure.*"

In No. 53, the same writer says,—

"*D'un autre côté, il n'est pas nécessaire pour qu'une rivière soit considérée comme navigable, qu'il y ait sur cette rivière une navigation effective et continuée; il suffit que la navigation y soit possible. Il a été décidé en ce sens qu'une rivière anciennement navigable ne cesse pas d'être comprise parmi les dépendances du domaine par cela seul que la navigation ou le flottage y aurait été interrompu depuis un temps plus ou moins long* (*Cons. d'Et.* 22 *Fev.* 1850, *aff. Dartigue, V. No.* 338, *V. aussi Cons. d'Et.* 5 *Août* 1829, *aff. Mirandol, V. Eaux, No.* 150)."

It is difficult to reconcile these two paragraphs.

The following is a passage from a *Traité des Cours d'Eaux*, by *Daviel*, vol. i., No. 36, p. 34:—

"*Mais un cours d'eau n'est réputé navigable parce que, d'un bord à l'autre, il existe un bac de passage, ou parce que quelques riverains, par pur agrément ou même pour l'exploitation de leurs fonds, se*

serviraient de bateaux. Il faut que d'amont en aval, il y ait navigation proprement dite, ou flottage en trains, et qu'en un mot, le cours d'eau fasse l'office de chemin et de voie de transport."

Dalloz adopts this view (*Rép.* tit. "*Eaux*," No. 39), he says :—"*Il ne suffit même pas qu'une rivière porte des batelets ou bacs pour le passage des personnes ou voitures, il faut qu'elle puisse être parcourue dans un espace assez considérable pour faire l'office de chemin et servir de moyen de transport.*"

These general definitions of *Daviel* and *Dalloz* shew that the question to be decided is, as from its nature it must be, one of fact in the particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability.

Their Lordships, assisted in their appreciation of the evidence by the findings of the learned Judges below, are disposed to think the result of it to be, that the river is navigable for boats, flats, and rafts, and that it is possible, at the exceptionally high tides referred to, to float barges as high as *Scott's Bridge*, but that the difficulties and risks which from natural causes attend the navigation of craft of this description are so great that the river in its present state does not admit of their use in a practical and profitable manner.

Turning to the question of damage, and supposing the river to be navigable in the degree just indicated, their Lordships are not disposed to dissent from the conclusion of the two Courts below, that the Plaintiff has not sustained damage by the construction of the bridge.

It is not disputed that small boats, flats, and rafts can be navigated as before, unobstructed by the bridge. The interruption complained of is that masted barges cannot pass it without lowering their masts.

It has been already said that the Plaintiff's land is used as a farm, and there is no evidence that its occupiers ever employed barges for the purposes of the farm. No produce has been carried from it, and no manure or other things brought to it by such vessels. It does not even appear that in the few instances in

J. C. 1879 BELL v. CORPORATION OF QUEBEC.

which Messrs. *Bell* are shewn to have brought up clay for their potteries it was landed upon this farm. The barges were on one or two occasions brought into a little creek, part of which adjoins the farm, but the clay appears to have been discharged at the *Corporation Road,* which is outside it.

It is evident that the Plaintiff did not prove that he had sustained damage from actual interruption of traffic. This was scarcely denied, but it was contended that his farm was depreciated in value by reason of the bridge. Upon this question there was a great conflict of testimony. The witnesses for the Plaintiff formed their opinion in great measure on speculations of future changes in the use and employment of the property, and of artificial improvements which might be made in the river. This latter speculation cannot legitimately be imported into the consideration of the question. With regard to the Plaintiff's witnesses generally, the Courts below obviously distrusted their evidence, and refused assent to their opinions. These witnesses failed to satisfy them that this farm, which has apparently no landing place, and whose owners had never used the river as a means of transport for conveying anything to or from it, was, having regard to the state of navigability of the river above described, really depreciated in value by the fact that masted barges would have to lower their masts to pass under the bridge.

Their Lordships understand the learned Judge of the Superior Court, who heard the witnesses, to base his judgment on the ground that no appreciable damage had been or would be caused to the Plaintiff's property by the construction of the bridge, and that judgment the Court of Queen's Bench has affirmed without altering the "*considérants*" on which it is founded. This tribunal usually accepts the concurrent findings of two Courts upon questions of fact, and their Lordships cannot say that sufficient reasons appear in the present case to warrant a departure from their rule.

The main contention, however, of the Appellant's counsel has been that the river, being, however imperfectly, navigable, the Appellant has a private right, belonging to him as riparian proprietor, to the free use and navigation of the river, independently of his right as one of the public, and that the construction of

the bridge is an infringement of that right which entitles him to maintain an action without proof of actual, and still less of special and peculiar, damage. A case from *Lower Canada*, presenting this question, and not unlike in its circumstances to the present, came before this Committee some years ago. (*Brown* v. *Gugy* (1).) In that case the Plaintiff, the owner of land and a mill abutting upon the navigable River *Beaufort*, brought an action against the riparian owner on the opposite bank for erecting a wharf, which it was alleged obstructed the flow of the water to the Plaintiff's mill, and also the navigation of the river. The Plaintiff claimed damages and the demolition of the wharf. A great deal of conflicting evidence was given at the trial upon the question of the alleged obstruction. The judgment of the Superior Court contained the following *considérants* which bear on the question of law now under discussion :—"Considering that the River *Beaufort* is alleged and proved to be a navigable river, and that any obstruction of the same would be a public nuisance; and considering that no action by an individual lies for a public nuisance, unless the party bringing such action has received special and particular damage therefrom." The judgment goes on to state that the Court further considered that the Plaintiff had failed to prove any special or particular damage, and the suit was dismissed. No doubt the Court also found in that case that the Plaintiff had not proved that the wharf obstructed or diverted the natural course of the river, but the *considérants* above set out indicate the view of the Court that if an obstruction had been proved the action would require proof of special damage for its support. The Court of Queen's Bench affirmed this judgment, and upon the appeal to Her Majesty this Committee declined to interfere with the concurrent findings of the two Courts in *Canada* on the question of fact that the Plaintiff had failed to prove that the work would be injurious to him. Lord *Kingsdown*, however, in giving the judgment, discusses the law of *Canada* on the subject. He says:—"The law of *Lower Canada*, as we collect it from the authorities, seems to stand thus. An officer suing on behalf of the public has a right, at his own instance or on the application of any person interested, to call for the demolition of any work

(1) 2 Moore, P. C. (N. S.) 341.

J. C. 1879 BELL v. CORPORATION OF QUEBEC.

erected without license on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person who complains of a wrongful invasion of his property is obliged to prove that it has occasioned actual damage to him; but, although such an officer may, if he think proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty, to interfere. A case of this kind is put by *Proudhon* (*Traité du Domain Public*, tom. iii. p. 192, No. 820) in a passage cited by Mr. Justice *Aylwin*. He says: 'It may be that in the case of a dyke erected in the bed of a navigable river, the dyke may do no injury to the actual state of the navigation, as being built in an arm of the river where navigation is not practised, and which, nevertheless, does not on that account cease to be a part of the public domain.'"

The judgment proceeds:—

"If the public officer refuse to interfere, an individual who suffers injury is not prejudiced, he has still his "*action privée*," by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct in their object. The fact that the place where the work is erected is public property is of course very important in both cases, in regard to the right of the Defendant to do what he has done, but it does not, according to the law, as we can collect it from the authorities, supersede the necessity of the Plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the Plaintiff in this case has failed to do."

In these passages the distinction between the "*action privée*," founded on a right of property which lies, if the right be invaded, without proof of damage, and the same action which arises only when the party is able to prove damage "special to himself," is plainly assumed to exist in the law of *Canada*, and to apply to cases analogous to that now under appeal. In the cited case, no doubt, the alleged obstruction was negatived, but the judgment is material for the view it presents of the law on the point now under discussion.

There appears to be a clear distinction in French law between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in it. In a case recently before this Board (*The Mayor of Montreal* v. *Drummond* (1)), the Plaintiff was the owner of houses in a public street in the city of *Montreal*, one end of which had been entirely stopped by the corporation. It was contended for the Plaintiff in that case that the right of passage through the street was a private right belonging to him as owner of these houses, and that the closing one end of the street was an interference with his property, and constituted "*une expropriation*" in respect of which he was entitled to previous compensation, and that this being unpaid, the act of the corporation was wrongful. It appears from the authorities cited in that case that the French law recognises "*droits d'accès ou de sortie*" as rights belonging to a house in a street, though the authorities differed as to whether a violation of these rights was to be regarded, for the purpose of indemnity, as "*une expropriation*," or as constituting only "*dommage*." It is evident that this right of access is different from the right of passage which the owner has in common with the public throughout the street; and the distinction is thus adverted to in their Lordships' judgment (2):—The right of access to a house is, of course, essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of *France* he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences." It is also said, "The counsel for the Plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view, but the weight of authority appears ta be the other way." After referring to some of these authorities the judgment proceeds :—"It certainly then appears that in *France* the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with the servitude, nor (standing alone) such direct

(1) 1 App. Cas. 384. (2) Ibid. 406.

J. C. 1879 BELL v. CORPORATION OF QUEBEC.

and immediate damage as will give a title to indemnity; and if this be so, there seems no reason or authority for declaring the law to be otherwise in *Canada*."

These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be "*droit d'accès et de sortie*" belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner. Their Lordships think that this right has not, in fact, been violated in this case; and that, supposing the bridge to cause some obstruction to the navigation, the Courts below are right in holding that the Plaintiff is not entitled to maintain the action in respect of it without proof of actual and special damage.

The learned counsel for the Appellant, in support of their contention on this point, did not at all refer to French or Canadian authorities, but referred only to English and American decisions. These, though they may illustrate the subject, cannot be treated as governing authorities upon the law of the province.

The principal cases cited were: *Beckett* v. *Midland Railway Company* (1), *Metropolitan Board of Works* v. *McCarthy* (2), and *Lyon* v. *Fishmongers' Company* (3).

In the case in the Common Pleas the railway company had made an embankment in a public road in front of the Plaintiff's house, by which the width of the road was considerably diminished, and the immediate access to his house interfered with. It was found as a fact that the house was thereby permanently injured in value. The Court held that the special damage sustained by the Plaintiff beyond that of the rest of the public gave him a right of action, and consequently a right to compensation. The Court, however, evidently thought that it was necessary for the Plaintiff to prove special damage, so that this case, even in English law, is beside the point now under discussion.

In the *Metropolitan Board of Works* v. *McCarthy* the facts were that the Plaintiff was possessed of land, on which he carried on

(1) Law Rep. 3 C. P. 82. (2) Law Rep. 7 H. L. 243.
(3) 1 App. Cas. 662.

trade, situate very near a draw dock in the *Thames*. This dock, which was much used by the Plaintiff for the purpose of his business, was wholly stopped up and destroyed by an embankment constructed by the Board, and the value of the land was thereby undoubtedly diminished. The House of Lords affirmed the judgments of the Court of Common Pleas and Exchequer Chamber given in favour of the Plaintiff. The Plaintiff was not strictly a riparian proprietor, and the decision again turned on the ground that the Plaintiff had sustained actual damage beyond that of the rest of the public. In this case the proximity of the Plaintiff's property to the dock was regarded; and no doubt the proximity of property to the highway must usually be a material element in the consideration of the question whether actual damage has in fact been caused to it by the obstruction.

In the *Caledonian Railway Company* v. *Ogilvy* (1) the House of Lords decided that the mere proximity of the claimant's house to the highway and to the obstruction did not create a particular damage which would give him a right of action. There the highway, which was the road by which the Plaintiff's house was approached, was obstructed by the railway being made to cross it on a level within a few yards of his lodge and entrance gate. This level crossing, though it undoubtedly created an obstruction very close to the entrance gate, which rendered the use of the road by those occupying the house constantly liable to interruption and delay, did not affect the immediate access to it, and though a jury had assessed compensation for the damage caused by this obstruction, it was held that the claimant had not sustained particular injury different in kind from that of the rest of the public, and his claim was disallowed.

The case most relied on by the Appellant's counsel was *Lyon* v. *The Fishmongers' Company* (2) in the House of Lords. There the Plaintiff was owner of a wharf on the *Thames*. One of its sides abutted on a tidal inlet which allowed of barges being brought up to and loaded and unloaded from and upon that side of the wharf. Under a license from the Conservators of the *Thames* the Defendants made an embankment fronting the river which entirely filled up the mouth of the inlet, and consequently

(1) 2 Macq. Sc. App. 229.

(2) 1 App. Cas. 662.

J. C. 1879 BELL v. CORPORATION OF QUEBEC.

prevented all access from it to the Plaintiff's wharf. The Act of Parliament which empowered the Conservators to grant the license contained a saving of the rights of owners of lands on the banks of the river. The question to be decided was, whether the right of access from the inlet to the wharf was a private right which fell within this saving, and the House, overruling the decision of the Lords Justices, held that it was. The learned counsel sought to press the authority of this case beyond the point which arose for adjudication, and treated it as an authority for the proposition that every riparian proprietor, as such, has, beyond his right as one of the public, a right to the use of the river in a free and uninterrupted manner, so that any obstruction placed in it would be an invasion of a private right, for which an action would lie, without proof of special or even of actual damage. It would obviously be very difficult to assign the limits of such a right, if it were established, especially in large rivers. Upon consideration of the opinions of the learned Lords, it does not seem to this Committee that their decision can be pressed to this extent. The distinction between the right of access from the river to a riparian frontage and the right of navigation when upon it is more than once adverted to, particularly by the Lord Chancellor, who referred, certainly not with disapproval, to the judgment of Lord *Hatherley*, when Vice-Chancellor, in the case of *The Attorney-General* v. *The Conservators of the Thames* (1), where that distinction is pointedly taken and acted upon. Whether an obstruction amounts to an interference with the access to the frontage would be a question of fact to be determined by the circumstances of each particular case. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage; though his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained.

The House of Lords undoubtedly decided that the right of access to the waterway from riparian land is a private right which

(1) 1 H. & M. 1. 8 Jur. N.S. 1203

the owner of such land enjoys *quâ* owner. Such a right is analogous to the "*droits d'accès et de sortie*" recognised by the French law. If, as it was contended, the English law attributes larger rights than these to riparian proprietors on navigable rivers, it would seem to go further in this direction than the law of *Canada*, according to which the case now under appeal has to be determined.

Their Lordships, considering that the bridge in question does not in fact interfere with the access to the Plaintiff's land, and therefore that by the law of *Canada* it was necessary for the Plaintiff to prove actual and special damage arising from it, and not disagreeing with the concurrent judgments of the Courts below that no such damage has been established, are of opinion that those judgments ought to be affirmed, and they will humbly advise Her Majesty accordingly.

The Appellant must pay the costs of this appeal.

Solicitors for Appellant: *Hollams, Son, & Coward.*
Solicitors for Respondent: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.* 1879 Nov. 11, 12; Dec. 13.

SIR ANTHONY MUSGRAVE . . . . . DEFENDANT;

AND

JOSÉ IGNACIO PULIDO . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT AT JAMAICA.

Acts of State—Authority of Governor—Jurisdiction—Privilege—Pleading.

Trespass for seizing and detaining at *Kingston* in *Jamaica* a schooner of which the Plaintiff was charterer, and which had, as alleged, put into the port of *Kingston* in distress and for repairs.

Plea in substance of privilege and to the jurisdiction, that the Defendant was Captain-General and Governor-in-Chief of the Island of *Jamaica*, that the acts complained of were done by him as Governor of the island and in the exercise of his reasonable discretion as such, and as acts of state.

The plea did not aver even generally that the seizure of the Plaintiff's ship was an act which the Defendant was empowered to do as Governor, nor even that it was an act of state:—

Held, that the judgment *respondeat ouster* was right and must be affirmed.

The Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of Municipal Courts to determine whether any act of power done by a Governor is within the limits of his authority and therefore an act of state.

Quære, how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

APPEAL from a judgment of the Supreme Court (July 6, 1878) allowing the Respondent's demurrer to the Appellant's plea.

The Respondent, by his declaration in the action, dated the 22nd day of November, 1877, claimed from the Appellant the sum of £14,000 damages in trespass for the unlawful detention by the Appellant of a certain ship called the *Florence* and her cargo, in the port of *Kingston*, in the island of *Jamaica*, of which ship the Respondent was the charterer; the said ship, whilst on a voyage

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

from *Colon* to the Island of *St. Thomas*, having been compelled to put in to the said Port of *Kingston* for repairs.

On the 17th of December, 1877, the Appellant, by his attorney, filed certain pleas, the only plea material to this appeal being as follows:—"The Defendant, Sir *Anthony Musgrave*, by *Samuel Constantine Burke*, his attorney, comes and says that he ought not to be compelled to answer in this action because, he saith, that at the time of the grievances alleged in the said declaration, and at the time of the commencement of this action, he was, and still is, Captain-General and Governor-in-Chief of the Island of *Jamaica* and its dependencies, and was, and still is, as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as Governor of the said Island of *Jamaica*, and in the exercise of his reasonable discretion as such, and as acts of state, and this the Defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action."

On the 4th of June, 1878, it was ordered by consent of counsel that all pleas of the Appellant, except the plea of privilege by attorney, should be struck out, together with replications and entry of judgment of *non pros*, with liberty to the Respondent to demur.

On the 10th day of June, 1878, the Respondent duly filed his demurrer to the Appellant's plea, alleging the following grounds of demurrer:—

1. That the plea did not disclose any privilege exempting the Defendant, Sir *Anthony Musgrave*, from answering this action.

2. That the plea gave no better writ.

On the 10th day of June, 1878, the Appellant's joinder in demurrer was filed, and judgment was delivered (*Smith*, C.J., and *Ker*, J.) whereby it was ordered:—That judgment be entered for the Plaintiff on the said demurrer, and the Defendant, Sir *Anthony Musgrave*, do answer further to the said writ and declaration of the Plaintiff; and the said Defendant is given until the 30th of July instant to plead in chief to the said declaration; and it is further ordered that the Defendants do pay the Plaintiff's costs.

J. C.
1879
MUSGRAVE
v.
PULIDO.

The *Attorney-General* (Sir *J. Holker*), and Mr. *A. L. Smith*, for the Appellant, contended that the plea was good in substance as well as a plea of privilege. As to the form of the plea reference was made to *Jamaica Act*, 28 Vict. c. 37. This is a plea in bar and not in abatement. [SIR MONTAGUE E. SMITH:—It is treated in your favour as a plea in abatement. Otherwise if the demurrer had been allowed it would have concluded you unless you had obtained leave to amend.] Reference was made to *Reg.* v. *Cooke* (1) and *Digby* v. *Alexander* (2), and to the plea in *Mostyn* v. *Fabrigas* (3). Although some of the decisions shew that a governor may be sued under certain circumstances, yet the Appellant as Governor of *Jamaica* is not liable to be sued in the Courts of the island in an action of trespass or for acts done by him as acts of state. The effect of the demurrer is to admit that the acts complained of were done by the Appellant in his reasonable discretion as Governor of the island and as acts of state: *Tandy* v. *Earl of Westmoreland* (4); *Luby* v. *Lord Wodehouse* (5). See also the cases collected in *Forsyth's* Constitutional Law (1869), p. 86; *Nabob of the Carnatic* v. *East India Company* (6); *Buron* v. *Denman* (7); *Secretary of State for India in Council* v. *Kamachee Sahiba* (8); *Cameron* v. *Kyte* (9); *Phillips* v. *Eyre* (10).

Mr. *Herschell*, Q.C., and Mr. *Gainsford Bruce*, for the Respondent, contended that the Appellant did not set up his plea as a plea in bar. He thereby claimed and intended to claim his privilege as Governor, and did not rely upon it as a defence to the action, but as precluding the necessity of defending himself at all. The plea shews no sufficient grounds why the writ should be stayed without requiring the Appellant to answer over on the merits; it cannot be taken as a plea to the jurisdiction, being pleaded by attorney and not in person; it gives no better writ and therefore is bad. If the act complained of had been shewn to be an act of state, it would have been a defence as well in the Courts

(1) 2 B. & C. 871.
(2) 8 Bing. 416.
(3) Cowp. 170.
(4) 27 How. St. Tr. 1246, 1264.
(5) 17 Ir. Com. Law Rep. 618.
(6) 1 Ves. Jun. 371; S. C. 2 Ves. Jun. 56.
(7) 2 Ex. 167.
(8) 13 Moore's P. C. 22.
(9) 3 Knapp P. C. 332.
(10) Law Rep. 4 Q. B. 225; 38 L. J. (Q.B.) 113.

J. C.
1879
MUSGRAVE
v.
PULIDO.

of the island as of the *United Kingdom;* but it is not everything which a man does *quâ* governor which is an act of state. A private individual may set up that what he did was an act of state, provided he was armed with the necessary authority. If he exceeds the authority, it is not an act of state, unless subsequently ratified: *Buron* v. *Denman* (1). There is no personal privilege appertaining to the office of Governor of *Jamaica* which exempts him from being sued in the Courts of the island; and the allegation in the plea that the acts in question were done by the Appellant as Governor, and in the exercise of his reasonable discretion as such, and as acts of state, is no ground for staying the writ and exempting the Defendant from answering. In the two Irish cases cited on the other side the Courts took judicial notice that the acts were acts of the Governor acting as such. [SIR MONTAGUE E. SMITH:—To test whether this is a good plea, see what the Appellant would have to prove, and whether if proved it would be an answer.] He would have to prove that what he did was an act of state, shew what he did, how he did it, and in what character. [SIR JAMES W. COLVILE referred to *Forester* v. *Secretary of State* (2) to shew that it is a question of fact whether an act is an act of state.]

Mr. *A. L. Smith* replied.

1879
Dec. 13.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

To an action of trespass brought against the Appellant, Sir *Anthony Musgrave,* in the Supreme Court of *Jamaica,* for seizing and detaining at *Kingston* in *Jamaica,* a schooner called the *Florence,* of which the Plaintiff was charterer, and which had, as alleged, put into the port of *Kingston* in distress and for repairs, the Appellant pleaded the following plea:—

The Defendant, Sir *Anthony Musgrave,* by his attorney, comes and says that he ought not to be compelled to answer in this action, because he saith that at the time of the grievances alleged in the said declaration, and at the time of the commencement of

(1) 2 Ex 167. (2) Law Rep. Ind. App. Sup. Vol. p. 10.

J. C. 1879 MUSGRAVE v. PULIDO.

this action, he was and still is Captain-General and Governor-in-Chief of the Island of *Jamaica* and its dependencies, and was and still is as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as Governor of the said Island of *Jamaica*, and in the exercise of his reasonable discretion as such, and as acts of state; and this the Defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action."

The Plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the Appellant to answer further to the writ and declaration.

The plea is in form a dilatory plea, and does not profess to contain a defence in bar of the action. It was advisedly pleaded as a plea of privilege, with the object of raising the question of the immunity of the Appellant as Governor from being impleaded and compelled to answer in the Courts of the Colony. That this was so is plain not only from the form of the plea, but from an arrangement come to between the parties before the argument of the demurrer. In an interlocutory proceeding to set aside a judgment of *non pros* as irregularly obtained an order was made by consent "that all pleas of the Defendant, Sir *Anthony Musgrave*, except the plea of privilege by attorney, be struck out, together with replications and entry of judgment of *non pros.*, with liberty to the Plaintiff to demur, it being arranged that the demurrer be set down for hearing at the present term, and if a judgment *respondeat ouster* the Defendant, Sir *Anthony*, have liberty to plead not guilty by statutes."

The decision of the Supreme Court was accordingly given upon the plea, as a plea of privilege, and altogether upon this aspect of it, the judgment being one of *respondeat ouster*.

Upon the hearing of the present appeal the Attorney-General, on the part of the Appellant, whilst not giving up the plea in the shape in which it was pleaded, insisted that if it disclosed a good defence in substance to the action, as he contended it did, its form and the arrangement of the parties might be disregarded, and a general judgment given for the Defendant; and, though

under protest from the Respondent's Counsel, the discussion at their Lordships' Bar was allowed to take the wider scope which the Attorney-General's contention introduced into the case.

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the Governor from liability to be sued in the Courts of the Colony, their Lordships think that it cannot, in that aspect of it, be sustained.

The dictum attributed to Lord *Mansfield* in *Fabrigas* v. *Mostyn* (1), that "the Governor of a colony is in the nature of a Viceroy, and therefore locally during his government no civil or criminal action will lie against him, the reason is, because upon process he would be subject to imprisonment," was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord *Brougham* in the case of *Hill* v. *Bigge* (2). In that appeal their Lordships were of opinion that the plea of the Lieutenant Governor of the Island of *Trinidad* to an action brought against him in the Civil Court of the island, claiming that whilst Lieutenant Governor he was not liable to be sued in that Court, could not be sustained. The action was for a private debt contracted by the Defendant in *England* before he became Governor, but the principle affirmed by the judgment is that the Governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the colony. The claim to such exemption is thus met:—"If it be said that the Governor of a colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him."

The Defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him "as Governor," and as "acts of state." Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the Courts of the colony in which he holds that office, as a personal privilege,

(1) 1 Cowp. 161. (2) 3 Moore, P. C. 465.

J. C. 1879 MUSGRAVE v. PULIDO.

simply from his being Governor, and is obliged to go further, his plea must then shew by proper and sufficient averments that the acts complained of were acts of state policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of state. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action, not only in the Courts of the colony, but in all Courts; and therefore it would seem to be a consequence of the decision in *Hill* v. *Bigge* (1) that the question of personal privilege cannot practically arise, being merged in the larger one, whether the facts pleaded shew that the acts complained of were really such acts of state as are not cognizable by any municipal Court.

In the case of *The Nabob of the Carnatic* v. *The East India Company* Lord *Thurlow* said, that a plea pleaded in form to the jurisdiction of the Court, but which denied the jurisdiction of all Courts over the matter, was absurd; and that such a plea if it meant anything, was a plea in bar (2).

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney-General, viz., that it discloses in substance a defence to the action.

Before adverting to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of Governors of colonies has been considered. In the leading case of *Fabrigas* v. *Mostyn* (3), the action was brought against Mr. *Mostyn*, the Governor of *Minorca*, for imprisoning the Plaintiff, and removing him by force from that island. The Governor's special plea of justification alleged, that he was invested with all the powers, civil and military, belonging to the government of the island, that the Plaintiff was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants, in breach of the peace, and that, in order to preserve the peace and government of the island, he was forced to banish the Plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial the

(1) 3 Moore, P. C. 465. (2) 1 Ves. Jun. 388. (3) 1 Cowp. 161.

Governor failed to prove this plea, and the Plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the Judge, Lord *Mansfield* said his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the Governor to be sued was raised, and very fully discussed, one ground of objection being, that he could not be sued in *England* for an act done in a country beyond the seas, and upon this question Lord *Mansfield* declared that the action would, to use his own phrase, "most emphatically" lie against the Governor. His judgment proceeds to shew, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, "If he has acted right according to the authority with which he is invested, he may lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a proceeding."

In the case of *Cameron* v. *Kyte* (1), which came before this Board on an appeal from the colony of *Berbice*, the question was, whether the Governor had authority to reduce a commission of 5 per cent. upon all sales in the colony, granted to an officer called the Vendue Master by the *Dutch West India Company* before the capitulation of the colony to the British Crown. It was urged that the Governor was the King's representative, exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the Governor did not hold the position or possess the authority sought to be attributed to him, and that the act in question was beyond his powers. In the judgment of this Committee, delivered by Baron *Parke*, it is said:—

"There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of Governor. If a Governor had, by

(1) 3 Knapp, 332.

J. C. 1879 MUSGRAVE v. PULIDO.

virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject, living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or *dictum* has been cited before us to shew that a Governor can be considered as having delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to Colonial Governors conveys such an extensive authority."

Again, it is said:—"All that we decide is that the simple act of the Governor alone, unauthorized by his commission, and not proved to be expressly or impliedly authorized by any instructions, is not equivalent to such an act done by the Crown itself."

In the well known case of the action brought by Mr. *Phillips* against Mr. *Eyre*, the former Governor of *Jamaica*, for acts done by him, whilst he was Governor, in suppressing an insurrection in that colony, the question raised was, whether the Colonial Act of Indemnity was an answer to an action brought in *England*. That such an Act was thought to be necessary, and that it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this Act, have been maintained. It is to be observed, however, that the facts of the rebellion and of its suppression were averred in the plea by way of introduction to the Act of Indemnity, and

Mr. Justice *Willes*, in delivering the judgment of the Exchequer Chamber, after saying that the Court had discussed the validity of the defence upon the only question argued by counsel, viz., the effect of the Colonial Act, adds, "but we are not to be understood as thereby intimating that the plea might not be sustained upon more general grounds as shewing that the acts complained of were incident to the enforcement of martial law" (1). It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shewn by distinct averments in the plea.

It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from *Ireland* were cited by the Defendant's counsel, in which the Irish Courts stayed proceedings in actions brought against the Lord Lieutenant of *Ireland*. In these cases the Lord Lieutenant appears to have been regarded as a Viceroy. In both the facts were brought before the Court, and in both it appeared that the acts complained of were political acts done by the Lord

(1) Law Rep. 6 Ex. 31.

J. C. 1879 MUSGRAVE v. PULIDO.

Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The Courts appear to have thought that under these circumstances no action would lie against the Lord Lieutenant in *Ireland*, and upon the facts brought to their notice it may well be that no action would have lain against him anywhere. (*Tandy* v. *Earl of Westmoreland* (1); *Luby* v. *Lord Wodehouse* (2).)

Several cases were cited during the argument of actions brought against the *East India Company*, and the Secretary of State for *India*, in which questions have arisen whether the acts of the Indian Government were or were not acts of sovereignty or state, and so beyond the cognizance of the Municipal Courts. The *East India Company*, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the Municipal Courts in *India*, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated "acts of state," have been declared to be within the cognizance of those Courts. Thus, in the *Rajah of Tanjore's Case* (3), the question to be decided was thus stated by Lord *Kingsdown* in giving the judgment of the Committee:—"What is the real character of the act done in this case? was it a seizure by arbitrary power on behalf of the Crown of *Great Britain* of the dominion and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law, or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation." This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a Municipal Court. The answer of the *East India Company* in that case did not rest on the simple assertion that the seizure was an act of state, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into these treaties, and in treating the sovereignty and territories of *Tanjore* as lapsed to the *East India*

(1) 27 State Trials, 1246. (2) 17 Ir. Com. Law Reps. 618.
(3) 13 Moore, P. C. 22.

Company in trust for the Crown, the Company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of *Great Britain*, and that all the acts set forth in the answer "were acts and matters of state."

In the case of *Forester and others* v. *Secretary of State for India* (1) in which the judgment of this Committee was delivered on the 11th of May, 1872, a defence of the same nature as that in the last-mentioned case was set up; but the decision there was on this point against the Secretary of State. In this suit also the answer set out the facts which were relied on to shew that the action of the Government complained of was a political act of state.

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of *India*, whether in this country or in *India*, the pleas and answers of the Government have shewn, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the Courts. (See the *Nabob of Carnatic* v. *East India Company* (2); *Ex-Rajah of Coorg* v. *East India Company* (3); *Rajah Salig Ram* v. *Secretary of State for India* (4), in which judgment was given by this Committee on the 27th of August, 1872).

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the Courts, but that the Courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of state that it was decided they could not take further cognizance of them. It is to be observed that the sovereign authority conferred upon the *East India Company* appears in Acts of Parliament, and therefore, without being pleaded, the Courts would have judicial notice of it.

Coming to the present plea, we find that, after stating that the Defendant was Captain-General and Governor-in-Chief of the Island of *Jamaica*, the only averments in it are, that the acts

(1) Law Rep. Ind. App. Sup. Vol. p. 10.
(2) 1 Ves. Jun. 388.
(3) 29 Beav. 300.
(4) Law Rep. Ind. App. Sup. Vol. p. 119.

J. C. 1879

MUSGRAVE v. PULIDO.

complained of were done by him as Governor of the island, and in the exercise of his reasonable discretion as such, and as acts of state. There is no attempt to shew the occasion on which the seizure of the Plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of state, became and was such an act. The plea does not aver, even generally, that the seizure was an act which the Defendant was empowered to do as Governor, nor even that it was an act of state. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the Defendant assumed to make the seizure as Governor, and assumed to do it as an act of state, without shewing that the act itself was an act of state properly so called, and was within the limits of his authority. It was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their Lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the Governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of state, could be called on to shew in the Courts of the Colony that the seizure complained of was really an act of state, of the nature and class of those which, as Governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the Court from entering upon such an inquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had been taken, for the Court must then have gone into the very inquiry which it was the manifest purpose of the plea to avert. It appears to their Lordships that the Plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to an action.

It was contended that, under "The Supreme Court Procedure Law, 1872," of the Colony, which provides that defects in form shall be disregarded, and that on demurrer the Court shall give judgment according to the very right of the cause, the judgment

should now be given for the Defendant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause cannot be pronounced.

J. C. 1879 MUSGRAVE v. PULIDO.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the Court below, and with costs.

Solicitors for Appellant: *The Treasury Solicitor.*

Solicitors for Respondent: *Cookson, Wainewright, & Pennington.*

[PRIVY COUNCIL.]

PIERRE VINCENT VALIN . . . . . APPELLANT;

AND

JEAN LANGLOIS . . . . . RESPONDENT.

J. C.* 1879 *Dec.* 13.

IN RE PETITION OF PIERRE VINCENT VALIN.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, s. 92, *sub-s.* 14—*Canada Statute*, 37 *Vict.* c. 10—*Distribution of Legislative Power—Jurisdiction of Superior Court—Election Petitions.*

8 Cl. & Fin. 165

The *Dominion Controverted Elections Act* of 1874 (Canadian Statute, 37 Vict. c. 10) does not contravene sect. 92, sub-sect. 14, of the *British North America Act*, 1867.

The said sub-section does not relate to election petitions, while sect. 41 of the same Act reserved to the Parliament of *Canada* the power of creating a jurisdiction to determine them.

The Parliament of *Canada* has power to commit such jurisdiction to existing Provincial Courts.

Special leave refused to appeal from two concurrent judgments of the Courts in *Canada* affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched.

THIS was a petition of special leave to appeal from a judgment of the Supreme Court of *Canada* (Oct. 28, 1879), affirming a judgment of the Chief Justice of the Superior Court of *Quebec* (Jan. 1879), dismissing certain preliminary objections of the

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1879 VALIN v. LANGLOIS.

Petitioner to an election petition filed against him by the Respondent. The election petition prayed that *Valin's* election to a seat in the Canadian House of Commons for *Montmorency* might be declared null and void for bribery practised by himself and his agents to his knowledge and with his consent. The objections were that the Superior Court of the Province of *Quebec* had no jurisdiction to entertain an election petition.

Mr. *Benjamin*, Q.C. (Mr. *Gainsford Bruce* with him), in support of the petition, urged that the appeal raised a question of very great importance, and one which had given rise to much conflict of opinion, viz., as to the validity of Act 37 Vict. c. 10. Though the Judges in this case were unanimous in upholding its validity, yet a different view has been taken by other Judges in other provinces. In the province of *Quebec*, it was stated that all the contestations had been suspended, the Judges awaiting the decision of the Privy Council before proceeding any further. With regard to the jurisdiction of the Superior Court in this case reference was made to the *British North America Act* (30 Vict. c. 3), ss. 41, 91, 92, sub-s. 14, 101, and to 36 Vict. c. 28, which makes provision for the trial of election petitions, and was repealed by 37 Vict. c. 10. See sects, 3, 33, 34, and 35 of the last-mentioned Act. See also 38 Vict. c. 11, ss. 47, 48. He submitted that the Parliament of *Canada* had, under the Imperial Act of 1867, no power to make laws in relation to the administration of justice in the province of *Quebec*, or to the constitution of any provincial Courts, or to procedure in those Courts. Consequently it had no power to confer any new jurisdiction upon the Superior Court, or to affect its procedure, or to impose new duties on its Judges; and therefore the Canadian Act of 1874 (37 Vict. c. 10) was *ultra vires* and inoperative. The Act of 1875, providing for appeals from decisions of the Superior Court under the Act of 1874, would stand or fall with the latter Act.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

Their Lordships have carefully considered the able argument which they have heard from Mr. *Benjamin*, and they feel glad

that so full an argument has been offered to them, because there can be no doubt that the matter is one of great importance. The petition is to obtain leave to appeal from two concurrent judgments of the Court of first instance and of the Court of Appeal affirming the competency and validity of an Act of the Dominion Legislature of *Canada*. Nothing can be of more importance, certainly, than a question of that nature, and the subject-matter also, being the mode of determining election petitions in cases of controverted elections to seats in the Parliament of *Canada*, is beyond all doubt of the greatest general importance. It therefore would have been very unsatisfactory to their Lordships to be obliged to dispose of such an application without at least having had the grounds of it very fully presented to them. That has been done, and I think I may venture to say for their Lordships generally that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been upon the present occasion by Mr. *Benjamin*.

In that state of the case their Lordships must remember on what principles an application of this sort should be granted or refused. It has been rendered necessary, by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal; and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted; that it is necessary to shew both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question, but the consideration of its importance and the nature of the question tell both ways. On the one hand those considerations would undoubtedly make it right to permit an appeal, if it were shewn to their Lordships, *primâ facie* at all events, that there was a serious and a substantial question requiring to be determined. On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of Constitutional Law in *Canada*, and upon a decision in the Court of Appeal there, unless their

J. C. 1879 VALIN v. LANGLOIS.

Lordships are satisfied that there is, *primâ facie*, a serious and a substantial question requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the Lower Courts were correct. It is not to be presumed that the Legislature of the dominion has exceeded its powers, unless upon grounds really of a serious character. In the present case their Lordships find that the subject-matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament, is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made; upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the provinces. One of those classes of subjects is defined in these words by the 14th sub-section of the 92nd clause: "The administration of justice in the province, including the constitution, maintenance, and organization of Provincial Courts both of Civil and of Criminal Jurisdiction, and including procedure in civil matters in those Courts." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined, is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section, which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the provinces, including the constitution, maintenance, and organization of Provincial Courts of Civil and Criminal Jurisdiction, and including procedure in civil (not in criminal) matters in those

Courts. Now if their Lordships had for the first time, and without any assistance from any thing which has taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature,—a thing which had been always done, not by Courts of Justice, but otherwise,—would come within the natural import of those general words: "The administration of justice in the province, and the constitution maintenance, and organisation of Provincial Courts, and procedure in civil matters in those Courts." But one thing at least is clear that those words do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of *Canada* should otherwise provide. It was therefore the Parliament of *Canada* which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of *Canada* so to legislate could be called in question. But the ground which is suggested is this, that it has seemed fit to the Parliament of *Canada* to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the provinces, and it is said that although the Parliament of *Canada* might have provided in any other manner for those trials, and might have created any new Courts for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard from Mr. *Benjamin*, they are at a loss to follow that argument, even supposing that this were not in truth and in substance the creation of a new Court. If the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament, and that

J. C. 1879 VALIN v. LANGLOIS.

which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the Legislatures of the provinces. The only material class of subjects relates to the administration of justice in the provinces, which, read with the 41st section, cannot be reasonably taken to have anything to do with election petitions. There is therefore nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the provinces. But in addition to that, it appears that by the Act of 1873, which, even by those Judges who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done. It was intended that when a Court of Appeal should be constituted for the dominion, a Judge of that Court of Appeal should be the Judge in the first instance of election petitions, and three Judges of the same Court should have power to sit in appeal from any judgment of a single Judge. But it was necessary also to provide for the interval between the passing of the Act and the constitution of such a Court of Appeal; and that Act of 1873 provided that in the meantime the Judges of the existing Provincial Courts should exercise, under regulations contained in it, the same jurisdiction. It did not indeed say the Courts; it said the Judges of the Courts; and that is really in their Lordships' view the sole difference, for this purpose, between the Act of 1873 and the Act of 1874. The Act of 1874 in substance does the same thing, except that in the definition clause it uses this language: "The expression 'the Court,' as respects elections in the several provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned or any Judges thereof;" and then it mentions by their known names the existing Courts of the different provinces. When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is conferred upon those Courts, but that everything necessary for

the exercise of that new jurisdiction is provided for, even the power to take evidence; it is said that a single Judge in rotation, and not the entire Court, is to exercise that jurisdiction; and in the 48th section,—"That on the trial of an election petition, and in other proceedings under this Act, the Judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a Judge of one of the Superior Courts of Law or Equity for the Province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the Court held by him in such trial shall be a Court of Record." Words could not be more plain than those to create this as a new Court of Record, and not the old Court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction. And all that is said as to the employment of the same officers, or of any other machinery of the Court for certain purposes defined by reference to the existing procedure of the Courts,—shews that the Dominion Legislature was throughout dealing with this as a new jurisdiction created by itself; although in many respects adopting, as it was convenient that it should adopt, existing machinery. Therefore their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act, as to its principle, and those provisions of the former Act which all the Judges of all the Courts in *Canada*, apparently without difficulty, held to be lawful and constitutional.

Then their Lordships are told that some of the Judges of the Courts of first instance have thought there was more of substance in the distinction than there appears to their Lordships to be, and have declined to exercise this jurisdiction. It has been said that five Judges have been of that opinion. On the other hand, two Judges of first instance—I think both in the province of *Quebec*, the Chief Justice, in the present case, and in another case, Mr. Justice *Caron*, a Judge whose experience on the Canadian Bench has been long, and whose reputation is high,—have been of opinion that this law was perfectly within the competency of the Dominion Legislature, and they could see nothing in the distinction taken between the present law, as to its principle, and the former. And now the question has gone to the Court of Appeal, the Supreme Court of *Canada*, which, constituted as a full Court of four Judges,

J. C. 1879. VALIN v. LANGLOIS.

has unanimously been of that opinion; and nothing has been stated to their Lordships, even from those sources of information with which Mr. *Benjamin* has been supplied, and which he has very properly communicated to their Lordships; nothing has been stated to lead their Lordships at all to apprehend that there is any real probability that any Judge of the inferior Courts will hereafter dispute their obligation to follow the ruling of the Supreme Court, unless and until it shall be reversed by Her Majesty in Council; nothing has been said from which their Lordships can infer that any provincial Legislature is likely to offer any opposition to such a ruling on this question as has taken place by the Court of Appeal, unless, as has been said, it should at any future time be reversed by Her Majesty in Council.

Under these circumstances their Lordships are not persuaded that there is any reason to apprehend difficulty or disturbance from leaving untouched the decision of the Court of Appeal. Their Lordships are not convinced that there is any reason to expect that any of the Judges of the Court below will act otherwise than in due subordination to the appellate jurisdiction, or refuse to follow the law as laid down by it. If indeed the able arguments which have been offered had produced in the minds of any of their Lordships any doubt of the soundness of the decision of the Court of Appeal, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for; but, on the contrary, the result of the whole argument has been to leave their Lordships under the impression that there is here no substantial question at all to be determined, and that it would be much more likely to unsettle the minds of Her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of this petition, and so throw a doubt on the validity of the decision of the Court of Appeal below, than if they were to advise Her Majesty to refuse it.

Under these circumstances their Lordships feel it their duty humbly to advise Her Majesty that this leave to appeal should not be granted, and that the petition should be dismissed.

Solicitors for Petitioner: *Flux, Slade, & Co.*

[PRIVY COUNCIL.]

ENGELTINA DIAS . . . . . PLAINTIFF;

AND

ALFRED DE LIVERA . . . . . DEFENDANT.

J. C.*
1879
Nov. 25, 26, 27; Dec. 19.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law—Mutual Will—Construction—Gift to a Class—Gift to Husband and Wife and another.

A mutual will is by Roman-Dutch law in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.

Denyssen v. *Mostert* (1) approved.

Where *A.* and his wife *C.* (who survived him) by "mutual will" appointed their daughter, her husband, and her then existing child (the Plaintiff), and also the other children "which may hereafter be procreated" by their daughter, to be the sole heirs of all the joint estate of *A.* and *C.* which should be left at the death of the first deceased of them, to be divided according to law amongst their daughter her husband and her child, as also by the children which may be hereafter procreated by their daughter; and it appeared that no such children came into existence until after the death of *A.* and *C.*:—

Held, that, on the due construction of the mutual will, *A.*'s intention was to divide his property (which he treated, moveable and immoveable, as one *corpus*) amongst the class of persons whom he had instituted his sole heirs, and that the distribution should take place when his will would become operative according to the ordinary rule of law. The words "which may be hereafter procreated" apply to children to be born between the date of his will and his death.

Held, further, that the daughter and her husband took, contrary to the English rule of construction, each a share, *i.e.*, each a third of *A.*'s estate instead of a moiety thereof between them, Roman-Dutch law assuming husband and wife for most purposes to be two separate persons.

Held, further, that although the son-in-law took a third share of *A.*'s estate on *A.*'s death, yet as he died before *C.* his share of *C.*'s property lapsed into the residue, which on her death the daughter and the Plaintiff were entitled to divide equally between them.

APPEAL from a judgment of the Supreme Court (June 19, 1877) affirmed by judgment on review (Nov. 16, 1877), whereby

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 4 P. C. 236.

J. C. 1879 DIAS v. DE LIVERA.

a judgment of the District Court of *Galle* (May 12, 1876) was set aside, and the case referred back with certain directions to the District Court.

The facts of the case and the material clauses of the mutual will are set forth in the judgment of their Lordships.

The judgment of the Supreme Court was as follows:—

"We think that this joint will must be considered as 'speaking' from the death of Don *Adrian*, the spouse who first died. It dealt with all the common property. So far as concerned Don *Adrian's* share it became irrevocable, and must 'speak' from his death; and so far as concerns the wife's share, without going into the question whether she could have revoked it after his death, it is sufficient to observe that she never did attempt to revoke it after his death, but allowed it to remain what the joint testators intended it to be when they made it, a will final as from the death of the spouse first dying.

"It is contended by the Plaintiff that the case falls under the English rule that when there is a gift to a class to be divided at a specified time, only those members of the class can take who were born before the specified period of distribution. We do not think the case does fall within that rule. In the first place we do not think that the testators have specified any period of distribution. The will bequeathed all the estate . . . . which shall be left at 'the death of the first dying spouse . . . .' 'to be divided' as hereinafter mentioned. Here the reference to the death of the first dying spouse is merely for the purpose of ascertaining the property which is to pass by the gift. There is nothing to shew an intention that the distribution should take place then. In the second place we observe that the gift is to *Merciana* and her then husband, and her child already born, and to a class (the future children of *Merciana*), of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within the principle of another rule mentioned at p. 85 of Mr. *Jarman's* book, viz., that when there is an immediate gift to children, if there is no child *in esse* at testator's death, all subsequently born children will take. If under these circumstances the sharing were restricted to *Engeltina*, the mention of 'the other children' would be rendered merely insensible. We

are of opinion that the gift must be shared by all the children *Merciana* had by both husbands.

"We next have to consider whether, as the District Judge has held, *Merciana* and her husband *Dias* take only one share between them or two. This District Judge has decided on the authority of Lord *Langdale's* judgment in *Gordon* v. *Whieldon* (1), that they take only one share. In that case Lord *Langdale,* in the absence of any discoverable indication as to what shares the testator meant the legatees to take, held that they, husband and wife, as one person in law, would take only one share between them. We think that here, as in *Gordon* v. *Whieldon* (1), the testators have not vouchsafed any expression of an intention one way or the other, but here the husband and wife are a husband and wife under the Roman-Dutch, and not under the English common law.

"At English common law, as *Littleton* lays it down, because husband and wife are one person only, if a joint estate in land be conveyed to husband and wife and a third person, the husband and wife shall take one moiety and the third person the other, and that, although at English common law the wife's freeholds are not the husband's absolute property. Are the husband and wife under the Roman-Dutch law to be similarly considered one person for the purposes of this gift? The wife's position as regards property is very different under the two systems. It may perhaps be argued that this difference as to property should not prevent the husband and wife under Roman-Dutch law from being regarded as one person, inasmuch as the English husband can have no more than a life estate at most in his wife's freeholds, and yet that does not prevent their being one person in law for the purpose of sharing a gift even of a freehold. The fact is that at English common law, although the wife has distinguishable rights as to her realty, her person is merged in that of her husband, her 'personal property,' that which attends the person, becomes her husband's property absolutely; even her *choses in action* become his if he reduces these into possession while she lives. The English distinction between real and personal property is unknown to the Roman-Dutch law, but none of the wife's property becomes the absolute property of the husband; on the contrary, the joint

(1) 11 Beav. 170.

J. C. 1879 DIAS v. DE LIVERA.

properties of both are thrown into a common stock administered by the husband during the marriage and divisible afterwards in moieties. The personality of the wife cannot be said to be merged in that of the husband under Roman-Dutch law. She is regarded as capable of contracting with her husband, as *Voet* points out in his title *de Ritu Nuptiarum* (XXIII., 2, 63), in the course of explaining some points in which the power of a husband over his wife is dissimilar to that to which minors, madmen, &c., are subject. This incident of itself is enough to prevent husband and wife from being regarded as one person only, and to this has to be added that under the Roman-Dutch law the husband and wife cannot be each other's heirs.

"*Voet*, indeed, in his title *de Testibus* (XXII., 5, 5) lets fall an expression which on a superficial view might perhaps be supposed to imply that he regarded this matter in the opposite light. He is discussing the reasons why a wife should not be compellable to give evidence for or against her husband, and says, '*Cum enim ex arctissimo matrimonii vinculo conjuges quasi in unum coaluerint.*" Here all that *Voet* means is to argue from the closeness of the marriage relation against the impolicy of compelling either spouse to what would be calculated to produce estrangement; we certainly do not regard him as intending to imply that the wife's personality is merged in her husband's, and a mere chance expression like this, even when employed by so eminent an authority as *Voet*, cannot avail against the undoubted characteristics of the married state under Roman-Dutch law. Under the English law the personality of the wife is merged in that of the husband; under the Roman-Dutch law the case is not one of merger but of mere subjection.

"For these reasons we think that we cannot restrict the participation of *Merciana* and her husband *Dias* in this gift to one share between them; we hold that each took one share.

"The result is, that the whole property passing under the gift is divisible into sevenths. *Merciana's* representatives take one share, *Dias's* representatives one share, *Engeltina* one share, and *Merciana's* other four children, or the respective representatives of each (for two are dead), one share each. Having thus laid down the principles according to which, in our judgment, the division

is to be made, it is unnecessary for us in this Court to work out the arithmetical computations of the subdivisions of these seven shares.

"There being no dispute as to the subject-matter of the gift, the decree of the District Judge is set aside and the case sent back, with directions to the District Judge to carry out the apportionment of the property upon the principles which we have laid down."

Mr. *Bompas*, Q.C., and Mr. *Kenelm Digby*, for the Appellant:—

By the law of *Ceylon* the property of husband and wife become on their marriage in the absence of special contract joint property, but is under the control and disposition of the husband. On the death of either, the property as it then exists, whether originally derived from the husband and wife or acquired by either during the marriage is divided equally between the survivor and the representatives of the deceased. By the same law all wills are made by notarial deeds, and in the case of mutual wills they operate as to one share on the death of the first, and as to the other share on the death of the second. The true effect of the mutual will in this case was to divide the property to which it related into two equal shares, and to give one share to the daughter *Merciana* and her husband *Dias* who were married with community of property. The other moiety of the property to which the mutual will related went on its true construction to the Appellant: *Bricker* v. *Whatley* (1).

Further, it was contended that no child of *Merciana* born after the death of *Don Adrian* and *Cornelia*, could have been entitled to any share so as to divest the Appellant of any portion of the share vested in her under the will. The children of her second marriage were not in any event entitled to share in the property comprised in the will; which clearly contemplated a distribution amongst the persons entitled at a period not later than the deaths of the testator and testatrix. No child of *Merciana* born thereafter could take. There were no words indicating an intention to benefit the children of any subsequent marriage which she might contract. Reference was made to *Williams* on Executors [8th Ed.

(1) 1 Vern. 233.

J. C. 1879 DIAS v. DE LIVERA.

1879], p. 1094, "The leading principle is that where a bequest is immediate to 'children' in a class children in existence at the death of the testator, and these alone, are entitled; amongst which children *in ventre sa mère* are to be considered; and it will make no difference that the bequest is to children 'begotten or *to be* begotten.'" See *Mann* v. *Thompson* (1); *Butler* v. *Lowe* (2); *Townshend* v. *Early* (3); *Storrs* v. *Benbow* (4); *Sprackling* v. *Ranier* (5); *Ringrose* v. *Bramham* (6); *Barrington* v. *Tristram* (7); *Jarman* on Wills [last Ed.], vol. ii. p. 137; *Gilbert* v. *Boorman* (8); *Right* v. *Creber* (9); *Hawkins* on Wills, p. 71; *Scott* v. *Harwood* (10).

Mr. *Cookson*, Q.C., and Mr. *Bulley*, for the Respondent:—

All the children born to *Merciana* were entitled to participate in the property left by the testator; the words of the testator will not be cut down unless it is clearly necessary to do so in order to give effect to the intention. It is necessary to wait where there is a gift to a class until the class is completed, and every member of it is *in esse* and able to take his share: see *Jarman* on Wills [3rd Ed.], vol. ii. p. 165; *Grey* v. *Pearson* (11); *Towns* v. *Wentworth* (12); *Mogg* v. *Mogg* (13); *Gooch* v. *Gooch* (14); *Defflis* v. *Goldschmidt* (15); *Hensman* v. *Fryer* (16); *Lancefield* v. *Iggulden* (17); *Theobald* on Wills, p. 32; *Martineau* v. *Briggs* (18). With regard to the contention that *Merciana* and *Dias* took one share between them, viz. a moiety, it was contended that each took a third. The rule of English law does not apply in *Ceylon* and to persons governed by the Roman-Dutch law; if it did very slight evidence of an intention that husband and wife should take separately will defeat the operation of the English rule. Here the intention was

(1) Kay, 638. 18 Jur. 826
(2) 10 Sim. 317.
(3) 28 Beav. 429.
(4) 2 M. & K. 46; 3 De G. M & G. 390. 17 Jur. 821.
(5) 1 Dick. 344.
(6) 2 Cox, 384.
(7) 6 Ves. 345.
(8) 11 Ves. 238.
(9) 5 B. & C. 866.
(10) 5 Madd. 332.
(11) 6 H. L. C. 61. 3 Jur. N.S. 829.
(12) 11 Moore, P. C. 526.
(13) 1 Mer. 654.
(14) 14 Beav. 565; 3 De G. M. & G. 366.
(15) 2 Mer. 417; 19 Ves. 566.
(16) Law Rep. 3 Ch. Ap. 420.
(17) Law Rep. 10 Ch. Ap. 136.
(18) 23 W. R. 889.

that each should take a third share. Reference was made to *Van Leeuwen's* Roman-Dutch Law, p. 421; *Bricker* v. *Whatley* (1); *Warrington* v. *Warrington* (2); *Paine* v. *Wagner* (3); *Gordon* v. *Whieldon* (4).

Mr. *Bompas*, Q.C., replied, referring to *Olivant* v. *Wright* (5); *Thompson's* Institutes of *Ceylon*, Duties of Executors, vol. ii.; *Davidson* v. *Dallas* (6); *Warrington* v. *Warrington* (2); *In re Wylde* (7).

1879
Dec. 19.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The following are the material facts of the case now under appeal:—

Don Adrian de Silva Goonetilleka Amarasiri Wardene Modliar, (to be hereafter called *Don Adrian*), and his wife *Cornelia Getruda Authmisz* (to be hereafter called *Cornelia*) being domiciled in *Ceylon*, and having one daughter *Merciana Dorothea*, married to *Henry Thomas Dias Abeyesinghe Mohandiram* (to be hereafter called *Dias*), by whom she had an only daughter, named *Angeltina*, made on the 17th of December, 1848, by a notarial deed, a "mutual will," a form of instrument well known to the Roman-Dutch law, which is in force in *Ceylon*.

The material parts of this will are as follows:—

Firstly. These appearers declared to give and bequeath to the poor a sum of £2, to be distributed according to the wish and discretion of the executors hereinafter named.

Secondly. These appearers declared to nominate, institute, and appoint their beloved daughter, *Merciana Dorothea*, and her husband *Henry Thomas Dias Abeyesinghe Mohandiram*, of *Galle*, and their child now existing and also the other children which may hereafter be procreated by their daughter, to be the sole heirs of all the estate, goods, effects, chattels and things whatsoever and wheresoever the same may be which shall be left at the death of the first

(1) 1 Vern. 233.
(2) 2 Hare, 54.
(3) 12 Sim. 184.
(4) 11 Beav. 170.
(5) 1 Ch. D. 346.
(6) 14 Ves. 576.
(7) 2 De G. M. & G. 724.

J. C. 1879 DIAS v. DE LIVERA.

deceased of the said appearers, whether moveable or immoveable, and of what kind or nature soever, which they the said appearers are now jointly in possession of as their common estate, that is to say, all the property which the first-named appearer was possessed of jointly with his first wife *Johannes Dias Lama Ettenay*, who died about the year 1838, an inventory whereof is filed in the late District Court of *Amblangodda* in the matter No. 42, and all the property, both moveable and immoveable, which the said first-named appearer has since acquired, to be divided according to law amongst their said daughter and son-in-law and their child as aforesaid, as also by the children which may hereafter be procreated by their daughter.

Thirdly. The appearers hereby declared to nominate and appoint the survivor of them, together with their aforesaid son-in-law, *Henry Thomas Dias Abeyesinghe Mohandiram*, to be the executors of the will of the first deceased of the appearers and administrators of his or her estate and effects, and the said appearers nominate the said *Henry Thomas Dias Abeysinghe Mihandiram* to be the executor of this will after the death of both the said appearers and administrator of their estate, hereby giving and granting to them and him jointly or severally all such power and authority as are required or allowed in law, and especially those of assumption, substitution, and surrogation.

Don Adrian died on the 6th of May, 1849.

On the 14th of August, 1858, *Dias* made a will, constituting his wife and daughter heirs of his estate, and died on the 1st of October, 1858.

Cornelia died on the 3rd of September, 1864. *Merciana* married on the 13th of April, 1865, *Alfred de Livera*, by whom she had four children, two of whom had died before the commencement of the suit.

This action was brought by *Angeltina* against *Livera*, her mother's second husband, complaining of his preventing her enjoying the share which she claimed of the properties dealt with by the will of *Don Adrian* and his wife, and praying to be declared entitled to one moiety of the properties in Lists B and D, annexed to her libel, and quieted in the possession of the same. B is a list of all the now forthcoming properties which were disposed of

by the mutual will. D is a list of the properties held by *Dias* and *Merciana* during their marriage in community; and the first item in it, to which alone this suit relates, is "one half of all the lands mentioned in the annexed List B." Under the will of *Dias* the Plaintiff is entitled only to one fourth of the property held by him and his wife in community, but in their Lordships' opinion is must be taken to have been admitted on the part of the Defendant that *Angeltina* was entitled to half of such property, whatever it may have been, if not by the operation of the will, by gift from her mother, or by family arrangement. By her libel, then, the Plaintiff claimed in effect to be entitled to three fourths of the properties in B, viz., half by virtue of the mutual will, and one fourth by virtue of the will of *Dias* and the arrangement with her mother.

The questions in the cause, which arose on the construction of the will of *Don Adrian* and *Cornelia*, are, first, whether or not the children of *Merciana* by her second marriage were entitled to share under it; secondly, whether *Merciana* and *Dias* took each a share or one share between them.

The District Court of *Galle* found, firstly, that the children of the second marriage did not take; and, secondly, that *Dias* and *Merciana* took one share between them.

The Supreme Court found that the children of the second marriage did take, and that *Dias* and *Merciana* took each a share.

It was admitted by the counsel on both sides, and indeed appears to have been assumed by the Courts, that the rules of construction applied to wills in this country apply to wills in *Ceylon*, modified as these rules must necessarily be in their adaptation to varying circumstances.

The Supreme Court appear to rest their decision on the first point above stated mainly on the ground that the children "to be procreated" of *Merciana* formed of themselves a distinct class. They observe, "The gift is to *Merciana* and her then husband, and her child already born, and to a class (the future children of *Merciana*), of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within another rule mentioned at p. 85 of Mr. *Jarman's* book, viz., that where there is an immediate gift to children, if

J. C. 1879 DIAS v. DE LIVERA.

there is no child in existence at the testator's death, all subsequently born children will take."

The counsel for the Respondent conceded that the judgment could not be sustained on this ground, and admitted that the "class" to be benefited included *Angeltina*, and, indeed, her father and mother. But he based his argument mainly on the following passage from Mr. *Jarman's* book on wills, and the authorities cited in support of it. (*Jarman* on Wills, 2nd edition, vol. ii. p. 147.)

"We are now to consider how the construction is affected by the words 'to be born' or 'to be begotten' annexed to a devise or a bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would but for the words in question have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to all the children who shall ever come into existence, since, in order to give to the words in question some operation, the gift is necessarily made to comprehend the whole."

In support of this proposition Mr. *Jarman* cites *Mogg* v. *Mogg* (1) and *Gooch* v. *Gooch* (2).

He refers to *Mogg* v. *Mogg* (1) in these terms, "Where a testator devised real estate to trustees in trust to pay the rents towards the support and maintenance of the child and children begotten and to be begotten of his daughter *Sarah Mogg*, it was contended that, notwithstanding the words 'to be begotten,' the devise could apply only to the children born before the testator's death, as these words might be satisfied by letting in the children born after the date of the will before the death of the testator. But the Court of King's Bench (in a case from Chancery) certified that all the nine children of *Sarah Mogg*, including those who were born after the death of the testator, took under the devise; and Sir *W. Grant*, M.R., expressed his concurrence in the certificate."

It is to be observed that (in accordance with the then practice) no reasons are given for the certificate of the Court of King's Bench, which was to the effect that all the children of *Sarah Mogg* took as tenants in tail with cross remainders, nor were reasons given for the concurrence with it of the Master of the Rolls.

(1) 1 Mer. 654. (2) 14 Beav. 565.

In *Gooch* v. *Gooch* (1) a testator devised lands to trustees in trust "during the lives and life of the longest liver of all the children of his daughter, *Mary Gooch*, hath or shall have," to apply the rents for the support of *Mary Gooch* and of all her children "which she shall from time to time have living," directing that when the youngest of her children who should live to attain twenty-one should have attained that age, the rents should be paid among the said children and the issue of such as should die leaving issue, and the survivor and survivors of them, during the life of the longest liver of the said children.

Sir *John Romilly*, M.R., held, on the authority of *Mogg* v. *Mogg* (2), that children born after the death of the testator were entitled under the trust for children during the minority of the youngest, yet that the time for admission of after-born children was not to be extended to the death of *Mary Gooch*, but to the period when the youngest child for the time being attained the age of twenty-one. His judgment proceeds much on the effect of particular expressions in the will.

Mr. *Jarman*, however, admits that this rule of construction does not apply to general pecuniary legacies, when the effect of letting in children born after the death of the testator would be to postpose the distribution of the general estate (out of which the legacies are payable) until the death of the parent of the legatees.

That children born after the death of the testator do not take under such circumstances has been held in many cases.

In *Storrs* v. *Benbow* (3), afterwards confirmed on appeal, Sir *John Leach* says, "this is an immediate gift at the death of the testator, and is confined to the children then living. The words 'may be born' provided for the birth of children between the making of the will and the death. The cases of *Sprackling* v. *Ranier* (4) and *Ringrose* v. *Bramham* (5) are direct authorities on this point. To give a different meaning to the words 'may be born' would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of all the children of either of his brothers."

(1) 14 Beav. 565.
(2) 1 Mer. 654.
(3) 2 My. & K. 46.
(4) 1 Dick. 344.
(5) 2 Cox, 384.

J. C. 1879 DIAS v. DE LIVERA.

Butler v. *Lowe* (1) is to the same effect. There the testator gave legacies to each of the children of his nephews and nieces "begotten or to be begotten." The Vice-Chancellor (Sir *Lancelot Shadwell*) held the gift confined to children born before the testator's death, and observed, "if there is a bequest to the children of *A.*, begotten and to be begotten, it has been generally held that the words 'to be begotten' shew only that the testator contemplated children to be born after the date of his will and before his death." The same principle was applied by Lord *Eldon* in *Whitbread* v. *Lord St. John* (2), where the words were "all the children born and to be born."

In *Parker* v. *Tootal* (3), Lord *Westbury* thus lays down the rule, "Whenever there are words used in a will indicative of a class, the words must be taken to denote the class, as it is constituted, either at the date of the will or at the death of the testator."

The late Mr. Justice *Williams*, than whom there is no higher authority, in his book on the law of executors and administrators, thus states the law applicable to bequests to children, "The leading principle is, that where a bequest is immediate to children as a class, children in existence at the death of the testator, and these alone, are entitled (amongst which children in *ventre sa mère* are to be considered), and it will make no difference that the bequest is to children 'begotten or to be begotten.'" In support of this proposition he cites the cases above referred to, as well as others, including *Mann* v. *Thompson* (4). He adds, however, in a note, "but a different rule prevails as to real estate," citing *Gooch* v. *Gooch* (5). He, of course, admits that a will disposing of personalty may be so drawn as to indicate a clear intention to include afterborn children, in which case effect must be given to the intention, as was the case in *Defflis* v. *Goldschmidt* (6).

It does not appear necessarily to follow that a rule which applies where land is devised to trustees, with a continuing trust to pay the rents and profits to those persons who may from time to time become entitled to an equitable estate, must apply where a will

(1) 10 Sim. 317.
(2) 10 Ves. 152.
(3) 11 H. L. C. 164.
(4) Kay, 638.
(5) 14 Beav. 566.
(6) 1 Mer. 417.

contains a simple direction to executors to distribute the *corpus* of a fund.

It must be borne in mind that many of the distinctions made by our law, founded as it is in some measure on the feudal system, between real and personal property, the estates and interests in them respectively, and their mode of devolution, are unknown to the Roman-Dutch law, which recognises no such estate as that to which the devisees were held entitled in *Mogg* v. *Mogg* (1). Though the question is not free from difficulty, their Lordships have come to the conclusion that the rule deduced from the authorities laid down by Mr. Justice *Williams* with respect to bequests of personal property is more applicable to the will now under consideration than the rule which was acted upon in *Mogg* v. *Mogg* (1).

The testator, dealing with his property, whether moveable or immoveable, and treating it as one *corpus*, simply directs it to be divided among the class of persons whom he had instituted his sole heirs. It appears improbable that he should have intended to deprive his daughter, a member of that class, of the benefit of the gift he had made to her, by postponing the distribution of the fund until after her death, or even to postpone her enjoyment of it till she, then a young woman, had passed the age of child bearing, and he may be reasonably assumed to have intended the distribution to take place when his will would become operative according to the ordinary rule of law. This interpretation gives effect to the words "which may be hereafter procreated," by applying it to children to be born between the date of the will and his own death. Whether, if grandchildren had been born between his death and that of his wife, they might have been entitled to a share of the whole or of half the property disposed of by the mutual will, does not arise, inasmuch as his wife died before the second marriage of his daughter.

On the question whether *Merciana* and *Dias* took one share or two, their Lordships agree with the Supreme Court.

The rule of English law that a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of English law that husband and wife are, for most

(1) 1 Mer. 654.

J. C. 1879 DIAS v. DE LIVERA.

purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine. *Warrington* v. *Warrington* (1), *Paine* v. *Wagner* (2), and other cases illustrate the nice distinctions which have been given effect to on this subject. Lord Justice *Knight Bruce*, in *In re Wylde* (3), attributes the rule to the position, which he describes as "peculiar," of husband and wife under our law.

Under the Roman-Dutch law the personal property of the wife is ordinarily, in the absence of special ante-nuptial agreement, held by the spouses as partners, each on the death of the other being entitled to his or her share, while in this country the whole personal property of the wife, including even such *choses in action* as he may reduce into possession, become the absolute property of the husband. It would not be difficult to point out many other important differences in the relations of husband and wife under the two systems of law; indeed, so many are these differences, that it would not be incorrect to state as a general proposition that whereas the English law assumes a husband and wife to be, for most purposes, one person, the Roman-Dutch law assumes them to be, for most purposes, two. Their Lordships are of opinion that the reason of the rule which applies in *England* fails in its application to *Ceylon*, and they construe the words of the will, which direct a division of property between three persons according to what seems their natural meaning, viz., as directing its division into three parts.

But this view does not altogether dispose of the interest of *Dias*. The Supreme Court appear to have assumed that the mutual will of *Don Adrian* and *Cornelia* "spoke" from the death of the first dying, and that, even if *Cornelia* might, after the death of her husband, have revoked it, yet, as she did not, it operated from that date upon the whole of the joint property.

Their Lordships cannot assent to this view. A mutual will is, as was pointed out by this Board in *Denyssen* v. *Mostert* (4), in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.

(1) 2 Hare, 54.
(2) 12 Simon, 184.
(3) 2 De G. M. & G. 726.
(4) Law Rep. 4 P. C. 236.

They regard the expression in the will, "all the estates, goods, effects, chattels, and things whatsoever and wheresoever the same may be which shall be left at the death of the first deceased of the appearers," as having no other operation than to describe the property dealt with by the will, excluding, as they do, property after acquired by the survivor.

Their Lordships are, therefore, of opinion that *Dias* took a third share of the property of *Don Adrian* on *Don Adrian's* death; but that, inasmuch as he died before *Cornelia*, his share of her property lapsed into the residue, which on her death her daughter and her granddaughter were entitled to divide equally between them.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, and that in lieu thereof it be declared that the children of *Merciana* by her second husband took nothing under the will of *Don Adrian* and *Cornelia* his wife. That upon the death of *Don Adrian* his half of the property dealt with by the will became divisible in three equal shares among *Merciana*, *Dias*, and the Plaintiff, and that upon the death of *Cornelia*, her half of the property became divisible in equal shares between *Merciana* and the Plaintiff; and that the Plaintiff is entitled to half of the property held in community by *Dias* and his wife, and the cause be remitted, with these declarations, to the Supreme Court of *Ceylon*. There will be no costs of this appeal.

Solicitors for the Appellant: *Cronin & Rivolta.*
Solicitor for the Respondent: *Arthur Cayley.*

[PRIVY COUNCIL.]

J. C.* 1880 *Jan.* 20, 21, 22, 23; *Feb.* 25.

MARIE ANNE CLAIRE SYMES AND HER HUSBAND, MARQUIS OF BASSANO . . } DEFENDANTS;

AND

MARIE ANGÉLIQUE CUVILLIER AND HER HUSBAND ALEXANDER MAURICE DELISLE . . . . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH IN THE PROVINCE OF QUEBEC, CANADA.

Canadian Law—Donations—Revocability of Gifts par la survenance d'enfants du donateur—Ordinance of 1731.

By a notarial deed, dated the 29th of May, 1866, the Appellant gave an annuity to the Respondent in trust for her five daughters "*pour partie de leurs frais de toilette et autres petits besoins personnels,*" the capital sum being thereby settled upon the daughters after their mother's death. The gift was made soon after the Appellant came of age, and amounted to about one-hundreth part of her whole estate; and it was to be presumed from the circumstances that if she had contemplated having children she would still have made it:—

Held, that, under these circumstances, by the law of *Canada* prior to the Civil Code (being that which existed in the jurisprudence of the Parliament of *Paris* before the Ordinance of 1731) the gift was not revocable on the birth of children.

The Ordinance of 1731 was not a mere declaration of existing law; and although it enacted that all gifts made by persons who had not children at the time of the donation "*de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites . . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur,*" yet such enactment did not take effect in *Canada proprio vigore*, never having been registered in *Canada*.

Hutchinson v. *Gillespie* (1), *Les Sœurs Hospitalières de St. Joseph* v. *Middleniss* (2) approved.

Consequently the French law introduced into *Canada* by the Edict of 1663 remained unaffected by the Ordinance; and it was not proved and

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 4 Moore's P. C. 378. (2) 3 App. Cas. 1102.

could not be presumed that such law became altered or modified in consequence of the jurisprudence of the province having adopted the rules contained in the Ordinance.

APPEAL from a judgment of the Court of Queen's Bench (June 22, 1878), reversing a judgment of the Superior Court (May 30, 1877), by *Rainville*, J., in favour of the Appellants.

The action was brought by the Respondents against the Appellants to recover payment of the amount of two instalments of interest or income on a certain donation or capital sum to the benefit of which the Respondent claimed to be entitled under a deed of gift made by the female Appellant, and which the Appellants refused to pay on the ground that the donation had been revoked and had ceased to be operative. The donation in question was made before the Civil Code of *Canada* came into force, and the principal question in the case was whether by the law in force in *Canada* antecedent to the Code the donation was revoked by the subsequent birth of children to the donor, the female Appellant.

The facts are stated in the judgment of their Lordships.

The declaration which was filed on the 14th of June, 1876, briefly set out the material parts of the deed of gift (for which see the judgment of their Lordships) and the non-payment of two instalments thereunder, and prayed that the Appellant might be condemned to pay to the Respondent the sum of $300 with interest and costs.

By her plea, filed on the 30th of June, 1876, the Appellant admitted the execution of the deed of gift, but pleaded that it was revoked by the birth of children. She further alleged that her husband was a foreigner, ignorant of the law of the province of *Quebec*, that since her marriage she and her husband had been domiciled in *Europe*, that it was not till their arrival in *Canada* in January, 1876, that either of them became aware that the birth of children could have the effect of revoking the deed of gift, and that all moneys which had been paid under the said deed since the birth of children had been paid in ignorance of the law and without any intention of ratifying or re-affirming the said gift.

By special answer to the plea, filed the 8th of July, 1876, the

J. C. 1880 SYMES v. CUVILLIER.

Respondent raised the issue of law by denying that the mere fact of the birth of children had the effect of revoking the gift. The answer further alleged in substance that at the time of the gift the Appellant owned real and personal property in *Canada* and elsewhere of great value, and that the gift of a comparatively small sum as pin money for the benefit of her five cousins, with whom she had always held relations of a most intimate character, and such as might have subsisted between sisters, was not in law, under the circumstances, revoked by the subsequent birth of children. Further that the Appellant was induced to make the said gift by moral considerations and with the view of carrying out what she knew to have been the wishes and intention of both her father and mother, and such a gift could not be affected by the subsequent birth of children. Lastly, that the Appellant after the Civil Code of *Lower Canada* came into force, not only paid the annual sum regularly, but repeatedly declared that it was her intention and wish that the said gift should be upheld, which was in law equivalent to a new donation unfettered with any restrictive condition. The Respondent also joined issue upon the Appellant's plea.

The Appellant replied by denying the several facts alleged in the answer of the Respondent, and further that the alleged facts afforded no answer in point of law to the Appellant's plea.

The judgment of *Rainville*, J., was to the effect that the Canadian Civil Code was not in force at the time of the execution of the deed of donation, and that by the law then in force every donation became and was revoked *ipso jure* by the subsequent birth of children; that even having regard to the fortune of the donor, the donation could not be regarded as a simple present, accompanied as it was by another gift of like value to another person; that the Respondents had not proved that the gift was made to discharge any moral obligation; and that a donation thus revoked *pleno jure* had no further existence at law, and was incapable of ratification or confirmation. He accordingly dismissed the claim with costs, declaring the donation in question revoked *ipso jure* from the 17th of November, 1873, the date of the birth of the first child of the Appellants.

The judgment of the Court of Queen's Bench (*Monk, Ramsay,*

and *Tessier*, JJ., *Dorion*, C.J., and *Cross*, J., dissenting), was as follows:—"The Court considering that the deed of donation of the 29th day of May, 1866, was made for the benefit of the five daughters of the said donee, cousins-german of the said donor, to provide "*partie de leur toilette et autres petits besoins personnels*;"

"Considering that the amount of the said donation was only equal to $10,000, and that the property of the said donor at the date aforesaid was about $1,000,000; and considering, therefore, that the said donation formed no considerable portion of the fortune of the donor, due regard being had to the object the said donor had in view as set forth in the said deed of donation;

"Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court of *Montreal* on the 30th day of May, 1877, dismissing the action of Appellants;

"Doth reverse and annul the same, and proceeding to pronounce the judgment which the said Superior Court ought to have rendered doth maintain the action and *demande* of the Plaintiff, and condemn the said female Defendant to pay to the said female Plaintiff the sum of $300, with interest from date of service of process, to wit, from the 3rd day of June, 1876, and the costs incurred by the said Plaintiff as well in the Court below as in this Court."

Mr. *Wills*, Q.C., and Mr. *William Wills*, for the Appellants:—

The deed of gift in this case, dated the 29th of May, 1866, was executed before the Civil Code of *Canada* came into force, *i.e.*, the 1st of August, 1866, and was therefore subject to the law as to revocation which was in force in *Canada* prior to the Code, and by that law a gift was revoked by the subsequent birth of children to the donor. Down to the date of the Code the common law of *Canada* (modified from time to time by colonial and imperial legislation) consisted of the law of northern *France*, where the *droit coutumier* prevailed, and particularly of the law as administered in the Court of the Parliament of *Paris*, *i.e.*, of the ancient customs modified by the jurisprudence of jurists and by royal ordinances, edicts, and *arrêts*.

French law as originally introduced into *Canada* by the edict of 1663 was founded upon the Roman law, and had adopted, and as

J. C. 1880 — SYMES v. CUVILLIER.

regards the revocability of deeds of gift was drawn from, a rule in the *Justinian* Code, Lib. VIII. 56, sect. 10, *De revocandis donationibus*, known as the law "*Si unquam*," which is as follows: "*Si unquam libertis patronus filios non habens bona omnia vel partem aliquam facultatum fuerit donatione largitus et postea susceperit liberos, totum quidquid largitus fuerit revertatur in ejusdem donatoris arbitrio ac ditione mansurum.*" Cf. Theodosian Code, bk. viii. tit. 13. As to the extent of the influence of the Roman law upon the subsequent law of *France*, see *Ortolan's Législation Romaine*, sect. 635 [9th Ed. p. 537]; *Laferrière's Essai sur l'histoire du droit Romain* [2nd Ed. 1859], vol. i. p. 234. It was not confined to the case of *patronus* and *libertus* as mentioned in the text, but extended generally; and when adopted into French law was treated as of general application, that is to cases of gifts *inter vivos* made by any person who had children at the time of the gift: see *Ricard* (*Jean Marie*) *Traité des Donations*, part iii. c. v. sect. 1, 2, 4, 5; *Les Œuvres de M. Antoine Despiesses*, vol. i. part 1, tit. 14; *Des Donations*, sec. 4, par. 2; *Ferrière's Corps et Compilation de tous les Commentateurs anciens et modernes sur la Coutume de Paris* (a work written in 1688–1692), vol iii. tit. 13; *Des Donations et Don mutuel*, par. 5, *De la Révocation de la Donation entre vifs par la survenance d'Enfants; Argou's Institution au Droit Français* (a work written before 1710), vol. i. bk. ii. c. xi., *Des donations entre vifs*. About the time of these authorities there was a difference of opinion whether the doctrine of *si unquam* as to revocability was to apply to gifts of whatever amount. Probably the better opinion about 1650 was that it was matter for the discretion of the Judge under all the circumstances of the case. The Judge had to decide what a man would probably have done if he had had children at the time of the gift. There is, however, only one *arrêt* to be found upon the point, viz., in 1708; see "*Journal des Audiences*," vol. v. bk. 8, c. 18, p. 133. Then, in 1731, a royal ordinance on the subject of donations was promulgated in *France*. At that time the law upon the subject had become somewhat unsettled, owing to the doctrine of *Cujacius* (who lived 1522–1590) that a donation was not revoked by the law of *France* unless it were *immensa* or *immodica*. See his *Opera Postuma* (*Neapoli*, 1758), vol. vii. col. 1280 D., 1281 A.; vol. ix. 31 C., 32 C. As to

the law as it existed in *France* at the time of the Ordinance, see *Andrea Tiraquelli, Regii Curiâ in Parisiensi Senatoris Commentarii in L. Si unquam C. de revocandi donationibus, Lugduni*, 1653, *verbis* "*omnia vel partem aliquam*," sec. 24; *Domat*, bk. i. tit. ii. sec. 3, art. 4. The law gradually became settled, and the ordinance of 1731 was declaratory of the then existing law: see *Recueil Général des Anciennes Lois Françoises par MM. Isambert, Decrusy et Taillandier*, vol. xxi. No. 415. By Art. 39 it was provided that, "*Toutes donations entre vifs faites par personnes qui n'avaient point d'enfants ou de descendants, actuellement vivants dans le temps de la donation, de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites*, etc. . . . *demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur, même d'un posthume*," etc. It concluded with the provision, "*Que la présente ordonnance soit gardée et observée dans tout notre royaume, terres et pays de notre obéissance, à compter du jour de la publication qui en sera faite*, etc. This ordinance, therefore, was clearly intended to apply to the whole of the French realm, including the colony of *Canada;* and its terms are, it is submitted, conclusive upon the present question.

To shew that it was intended to be declaratory of French law, and not a new enactment, reference was made to certain letters written by the Chancellor *D'Aguesseau* to the Parliaments, dated 10th of November, 1728, 3rd of May, 1730, 25th of June, 1731, 19th of May, 1731, 13th of June, 1731. See *Œuvres Complètes du Chancellier d'Aguesseau, Paris*, 1819, vol. xii. pp. 280, 323. Whether or not it had the imperative form of a statute in *Canada* (owing to its non-registration there) it did not purport to introduce entirely new legislation, but to declare and in minor details to reform the existing French law, and is therefore of the highest authority as to the Canadian law prior to the Code. It could not have failed to influence the development of the Common Law as it existed during the thirty years prior to the cession of Canada to the British, and the century afterwards. French jurisprudence apart from actual legislation must have told upon that law. [SIR JAMES W. COLVILE:—French cases are cited to this day as illustrative of the Canadian law, though *Canada* and *France* have now distinct codes. SIR ROBERT P. COLLIER referred to *Les Sœurs Dames Hospitalières*

J. C. 1880 SYMES v. CUVILLIER.

de S. Joseph de l'Hôtel Dieu de Montréal v. *Middlemiss* (1).] In many of the Canadian edicts and ordinances it is provided that French law should be followed. For examples see *Edit de création du Conseil supér. de Québec* [1663] and *Etablissement de la Compagnie des Indes Occidentales* [1664]; *Edits et Ordonnances*, vol. i. p. 37, and others in 1674, 1675, 1667, 1677, 1667, 1703, and 1704; *Ibid.* pp. 74, 83, 90, 97, 106, 299, 301. No general edict, except one with regard to blasphemies, has ever been registered in *Quebec*. Yet these unregistered edicts have influenced the state of the law. Reference was made to *Smith's* History of *Canada* (1815), which mentions the sources of Canadian law, p. 164; *St. Rochin* v. *Duchesne* (2), where the Ordinance of 1731 was treated as affecting *Canada*. See also Consolidated Statutes of *Lower Canada*, c. 2; Report of the Commissioners (Civil Code), vol. ii. p. 333; 29 Vict. c. 41 (preamble) ss. 1, 5; Civil Code, s. 812; *Pothier*, vol. viii. p. 408; *Traité des Donations entre vifs*, art. iv. s. 3, No. 167; *Furgole*, vol. ii. p. 89, *Des Donations;* 14 Geo. 3, c. 83; *Beaubien*, bk. ii. p. 100; *Demolombe, Code Napoléon* [1868] vol. xx; *Traité des Donations*, pp. 670, 671.

Mr. *Kenelm Digby* (Mr. *Barnard*, Q.C., of the Canadian Bar, with him) for the Respondents:—

With regard to French law as it existed prior to 1663 in those territories which were governed by the *Coutume de Paris*, the Appellants have not shewn that it included the principle contended for, *i.e., la révocation des donations par la survenance des enfants.* They rely on the rule *Si unquam* contained in the *Justinian* Code. But that law, according to the best authorities, was not extended beyond the particular case mentioned in the text of a *patronus* and *libertus*. In parts of *France* no doubt it was extended to gifts *inter vivos* made by any person without children at the time of the gift. The *Coutume de Paris*, however, never adopted such rule; see Art. 272, which recognises the free disposition of property by way of gift. Reference was made to *Ortolan's* Commentary on *Justinian*, vol. ii. p. 392, No. 575; *Pothier's* General Introduction, vol. i. p. 2, n.; *Fourgole*, Question xiv. No. 1; *Lamoignon dans ses arrêtés au titre des donations*, Art. 50, cited

(1) 3 App. Cas. 1102, 1118, 1119. (2) 3 Low. Can. Jur. 183.

in *Fourgole*. Then as to the argument upon the other side that independently of the Roman law, the principle contended for is to be deduced from text-writers and *arrêtés*, and was expressly laid down by the Ordinance of 1731. As regards the former, they are uncertain and conflicting, and fail to shew that this principle formed part of the customary French law, which was introduced into *Canada;* and, as regards the latter, it was never registered in *Canada*, and forms no part of Canadian law. The object of that ordinance was to render the law uniform in *France*. It was no doubt based on the opinion of those jurists who supported the application of the law "*Si unquam*" to all gifts; and was followed, almost word for word, in the Civil Code, arts. 960, 966. But the rule so laid down was never introduced or acted upon in *Canada*. As to the Ordinance of 1731 being an enacting and not a declaratory ordinance, see its provisions, especially those relating to prescription: see Art. 47 and Art. 39: *Sallé, Esprit des Ordonnances*, upon Art. 39, pp. 185, 187; *Merlin, Rép. vo. Donation*, s. 7; and the Circular Letter of the Chancellor *d'Aguesseau*, 10th November, 1728; see vol. xii. of his works, p. 280. No evidence was produced, and no case cited to shew that although the ordinance was never registered in *Canada*, it had nevertheless been adopted, and that the Common Law of *Canada* had developed *pari passu* with French law. The passages cited from the report of the Commissioners do not shew it, for they proposed the adoption of the rule which now appears in Art. 812.

With regard to the rules of the earlier French law, as it was introduced into Canada in 1663, it has not been shewn that this gift would have been revocable by reason of *survenance des enfants*. The circumstances and objects of the gift, and especially the proportion which the property given bore to the remaining property of the donor, must all be considered. *Cujas* says the gift must be *immensa* or *immodica* to justify revocation: see *Cujacius*, vol. ix. 31c–32c. col. 1352, B. 1354, D.; Compare *Papon* (A.D. 1621), bk. xi. Nos. 19, 20, p. 619; *Responses de Charondas*, bk. iii. No. 63, p. 88; an *arrêt* of March 14, 1656, reported in *Sæfve, Recueil de plusieurs questions notables tant de droit que coutumes*," vol. ii. cent. 1, ch. xviii. p. 15. See also *Lamoignon's Arrêtés*, which purport to be a consolidation of the highest practice of the law, Arts. 50, 51,

J. C. 1880 SYMES v. CUVILLIER.

vol. i. p. 250; and an *arrêt* of the 8th of February, 1629, in *Bardet's Rec. d'Arrêts*, p. 234; *Damours*, pp. 230, 325; *Ferrière*, vol. iii. p. 1132; *Journal des Audiences*, vol. bk. iv. c. 18.

The evidence in this case shewed that the gift affected barely an hundredth part of the donor's property, that it was drawn up by the donor's legal adviser, was acted on for many years, and in letters written by the Appellant both before and after the birth of her first child it is referred to and treated as permanently valid and binding. The fair presumption from all the circumstances of the case is that the Appellant would have made the gift if she had contemplated marriage and the birth of children at the time: see *Ricard, Traité des Donations*, part 3, c. 584.

It would be contrary to the policy of Canadian law existing at the date of the gift to imply a condition of revocability, contrary to its express terms. Free disposition of property was an established principle: Canadian law did not in 1866, whatever may have been the common law of *France*, allow such restriction upon the power of alienation as is contended for by the Appellants: see 14 Geo. 3, c. 83; 41 Geo. 3, c. 4; *Quintin* v. *Girard* (1). And as to the ratification of a gift after *survenance d'enfants*, see *Bourjon*, vol. ii. p. 147; *Fourgole's Ordonnance* of 1731, Art. 39; *Questions Remarquables*, 14, 37, 46; *Pothier's Traité de Donations*, Nos. 177, 178, 179. As to the effect on the ratification of ignorance of law, see *Reg.* v. *Mayor of Tewkesbury* (2). Lastly, it was contended that, whatever may have formerly been the law of *Canada*, this gift was governed by Art. 812 of the Canadian Civil Code. Reference was made to 20 Vict. c. 43 (Consol. Stat. *Low. Can.* c. ii.), s. 6; and to 29 Vict. c. 41, ss. 2, 6; and it was submitted that, on the true construction of the latter statute, the alteration in the law (if any) embodied in Art. 812 of the Code took place when 29 Vict. c. 41, came into force, *i.e.* in September, 1865.

Mr. *Wills*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The action which gives occasion to this appeal was brought in the Superior Court of *Lower Canada* by the Respondents, *Marie*

(1) 2 Low. Can. Jur. 141. (2) Law Rep. 3 Q. B. 635.

Angélique Cuvillier, and her husband, Mr. *Delisle*, against the Appellants, *Marie Anne Claire Symes*, and her husband, *Le Marquis de Bassano*, to recover two instalments of an annual income of £150, representing a capital sum of £2500, in virtue of a donation contained in a notarial deed executed by *La Marquise* before her marriage. The defence was, that by the law of *Lower Canada* existing at the date of the deed (29th of May, 1866), the gift was revoked by the subsequent birth of children of the donor.

The Court of Queen's Bench reversed the judgment of a Judge of the Superior Court, dismissing the action, and, by a majority of three Judges to two, gave judgment to the Respondents, against which the present appeal has been brought.

By the deed in question, the Appellant, *Marie*, gave to each of her two aunts, Mrs. *Delisle* (the Respondent) and Miss *Luce Cuvillier*, an annuity of £150 (currency), representing for each a capital of £2500. The gift to her aunt *Luce* was for her own use; that to Mrs. *Delisle* was in trust for her five daughters, "*pour partie de leurs frais de toilette et autre petits besoins personnels.*" The capital (£2500) was settled upon the daughters after their mother's death.

The following are the material facts. The Appellant *Marie*, who was the only child of Mr. *Symes* by his wife, a sister of the Respondent, Mrs. *Delisle*, was born in 1845. Her mother died in 1861, and her father some time before 1866; the exact date does not appear. Upon the death of her father she became possessed of a large fortune, viz., about one million dollars. The greater part of this large property she inherited from her father, but a part (the sum spoken of is £50,000) from her mother. From the time of her mother's death in 1861, until she went to *England* in 1869, she lived with her aunt *Luce Cuvillier*, and during that time constantly associated with her cousins *Delisle*.

The gift now in question was made soon after the Appellant came of age. She at the same time executed other deeds containing donations of an income of £600 a year to each of her uncles, *Austin* and *Maurice Cuvillier*, representing a capital sum of £10,000 to each. In all these transactions the Appellant consulted Sir *George Cartier*, who was her ordinary legal adviser.

It is suggested that one motive for these gifts was the wish

J. C. 1880 SYMES v. CUVILLIER.

expressed by the Appellant's mother, that if her husband did not marry again, and the Appellant succeeded to the whole of his large fortune, her (the mother's) property should go to her own relatives. It appears from the Appellant's evidence that, though she had not herself heard her mother mention this wish, her aunts had told her, and no doubt correctly, that she had expressed it. There is no evidence whatever that the Appellant was in any way imposed upon in making the gifts.

In August, 1872, the Appellant, *Marie*, whilst resident in *England*, married *Le Marquis de Bassano*, a French subject. After their marriage the Appellants resided either in *France* or *England*. A child of this marriage was born in November, 1873, and a second in November, 1874.

In letters written by *La Marquise*, whilst resident in *Europe*, to her uncle, *Maurice Cuvillier*, before and after her marriage, one being after the birth of her first child, she spoke of and recognised the donations. In a letter of the 9th of November, she says:—

"I also want to arrange so that the capital of the donations made by me at my coming of age to you, uncle *Austin*, aunt *Luce*, and aunt *Delisle*, should be paid down and given to each of you respectively, so that if I marry my husband cannot interfere, or know anything about it."

The instalments of the income of the donation in question in this action were duly paid down to November, 1875.

In January, 1876, the Appellants went to *Canada*, and *La Marquise*, as she states, and no doubt truthfully, then learned for the first time that, according to the law of *Canada* (as she was advised) her donations were revoked by the birth of her children. She thereupon resolved to repudiate them, and made no further payments.

It appears that on an investigation of accounts it was found that Mr. *Maurice Cuvillier*, the guardian of the Appellant *Marie* during her minority, and who had managed her property after she came of age, had mismanaged it, by which some losses were incurred.

The two uncles of the Appellants and her aunt *Luce* have renounced the gifts made in their favour, thus leaving as alone in question the donation to Mrs. *Delisle*, in trust for her five daughters.

To ascertain the law of *Canada* on this subject at the time the donation was made, it has been necessary to inquire into the law as it existed prior to the coming into force of the Civil Code of *Lower Canada*, which contains the following Article:—

"812. In gifts, the subsequent birth of children to the donor does not constitute a resolutive condition, unless it is so stipulated."

If the Code governed the question, this Article would be decisive in favour of the Respondents; but the Code did not come into force until the 1st of August, 1866, about two months after the date of the donation. It was, indeed, contended by the counsel for the Respondents that its provisions on this subject became the law of the Province upon the passing of the Act 29 Vict. c. 41, which sanctioned them; but their Lordships are clearly of opinion, for the reasons given by them during the argument, that this is not so, and that these provisions had not the force of law until the time fixed for the coming into operation of the Code.

The discussion at the Bar, which took a wide range, and was ably conducted on both sides, was directed, in the first place, to the consideration of the law of *France*. It appears that the question of the revocation of gifts by the birth of children was for several centuries a fertile subject of discussion and controversy amongst French jurists. This controversy was complicated by the varying jurisprudence of different Parliaments. The law which is to be principally regarded in deciding this case is that of the Parliament of *Paris;* the Edict of *Louis* XIV. (1663), which created the "*Conseil Supérieur*," and established Courts of Justice for *Lower Canada*, having directed that the "*Coutumes de Paris*" should be the general law of the Province.

The law of *France* was drawn from a rule in the Justinian Code, usually cited as the law "*Si unquam*," which is in the following terms:—

"*Si unquam libertis patronus filios non habens bona omnia vel partem aliquam facultatum fuerit donatione largitus et postea susceperit liberos, totum quidquid largitus fuerit revertatur in ejusdem donatoris arbitrio ac ditione mansurum.*"

The first question is to what extent, and under what modifica-

J. C. 1880 SYMES v. CUVILLIER.

tions, this law was adopted and prevailed in *France*. It was plainly enlarged as to the persons to be affected by it, and was not confined to the case of patron and freedman, or of persons in an analogous relation; whilst, on the other hand, it is evident that, at least in some parts of *France*, it was limited and modified as to the things given, in the direction of excluding from the operation of the rule such donations as were not of large value relatively to the estate of the donor. What this proportion was, how it was to be measured, and under what circumstances generally the rule was excluded, has been the subject of much diversity of opinion amongst French lawyers, and the jurisprudence of the Parliaments has undoubtedly not been uniform.

It was argued by the learned counsel for the Appellants that the text of the Roman law must be taken to have been the common law of *France*, where custom did not conflict with it. This may have been so in those parts of the south of *France* where the Roman law was held to govern as "*loi écrite*," but in other parts of the kingdom this would not seem to have been so, and, though in them the Roman law was resorted to by the Courts, and its principles were largely borrowed, yet these principles were not regarded as binding written law, and were capable of being, and in many cases were, modified by *les Coutumes* as expounded by the jurisprudence of the Parliaments.

Numerous French jurists have discussed with much ingenuity the question,—what part of a man's estate might be given without being subject to the condition of revocation on the birth of children. Some early writers argued that the words "*partem aliquam*" should be construed to mean an aliquot part. Traces of this fanciful rendering are found in subsequent writers, becoming however very faint in later times. Indeed this construction does not seem to have been persisted in, though it may have had some influence in moulding the law as it ultimately prevailed in the northern Parliaments of *France* before the Ordinance of *Louis* XV., in 1731.

It is to be collected from the passages cited from *Cujas*, an author of great authority, who wrote in the sixteenth century, that a donation was not revoked by the law of *France* unless it were "*immensa*" or "*immodica*." He puts the case of a man

who, when childless, gave a sixth of his property to his brother, and afterwards had a son, and then in answer to the proposition that by the law "*Si unquam*" the son could revoke the gift says:—

"*Fallacia est in propositione; nec enim est absolute hoc verum donationem filium postea susceptum revocare; sed ita distinguendum est; aut immensa est donatio, aut non, et aut mera est donatio, aut non; immensam donationem liberi postea suscepti revocant; hic non fuit immensa, sed sextantem tantum donavit.*"—*Cujacius*, Opera Postuma, 9 vol., 31c. (cited at the Bar from an edition published in *Naples*, 1758).

Cujas, therefore, was of opinion that the gift of a sixth part of the donor's property would not be "*immensa.*" It was argued that the authority of *Cujas* is weakened because he confused the law "*Si unquam*" with the *Lex Falcidia*. It is true that he refers to the *Lex Falcidia* in other passages, as bearing on his view of the law "*Si unquam*," but it is not at all likely that so great a lawyer would have been in any confusion of mind with regard to these laws.

In *Merlin, Rép. vo. Donation*, sec. 7, the state of the old law is adverted to as follows:—

"*Avant la promulgation de l'ordonnance de* 1731, *on disputait beaucoup sur la question de savoir jusqu'où devait s'étendre une donation pour qu'elle fût sujette à être révoquée par survenance d'enfants. Les uns voulaient qu'elle fût au moins de la moitié des biens du donateur, les autres soutenaient qu'il suffisait qu'elle fût de quelque partie, même au-dessous de la moitié. La jurisprudence n'était pas moins incertaine à cet égard.*"

Despiesses, whose work was first published in 1658, in treating of Donations (part i., tit. 14, sect. 4, sub-sect. 2, edit. 1750) has a passage to the same effect:—

"*Nono. Cette révocation a lieu non seulement lorsqu'il s'agit d'une donation de tous les biens du donateur, ou de la plus grande partie, mais même d'une partie des biens beaucoup moindre que la moitié.*"—(Referring to *Tiraqueau*, *Papon*, and other authorities.)

In the "*d'Arrêts de Papon*," a collection of *arrêts* published about 1559, *tit.* "Donations," livre xi., Art. xix., it is said:—

"*La disposition de la loi 'Si unquam' est aujourd'hui en France,*

J. C. 1880 SYMES v. CUVILLIER.

à sçavoir, que donations faites de tous biens, ou de moitié, quart, ou tiers, en faveur de mariage ou autrement (si la coustume locale n'y répugne) sont révoquées de loi sans autre mystère," by the birth of children.

He adds that it has been so determined by many "*Arrêts de Paris*" during the last twenty-five years. In a note by the editor, *Chenu*, a commentary on the law by *Du Moulin* is referred to, in which it is maintained that revocation would not take place unless the donation was "*de majore parte bonorum,*" and an *arrêt* pronounced "*en robes rouges*" by the Parliament of *Bordeaux* in 1602, is cited in support of this opinion.

The question was often raised, and the controversy regarding it is referred to in a book by *Damours*, intituled *Conférence de l'Ordonnance*, "*concernant les donations avec le Droit Romain,*" &c. (p. 324); whether "*donations particulières*" were revoked, or only those "*d'une quotité, comme d'un tiers, d'un quart, d'un sixième, dans l'universalité des biens.*" It appears from *Damours* that the Parliament of *Toulouse* had decided that "*donations particulières*" were revoked, but that the Parliament of *Paris* had decided the contrary. An *arrêt* of the latter Parliament (1656) reported by *Sæfve*, tom. ii., c. 18, is cited. From this report it appears that the gift was of a house and some land, and was not large in proportion to the property of the donor.

It would not be useful to refer further to *arrêts* upon the question of what would be the value of a gift in relation to the donor's property to prevent the operation of the law of revocation. *Sallé*, writing on the Ordinance of 1731, thus refers to the old *arrêts* on the subject:—

"*En considérant la jurisprudence des arrêts, on ne trouve point non plus stabilité, ni d'uniformité. Dans ceux qui ont prononcé la révocation des donations par survenance d'enfans, il y a des donations qui étaient de la moitié, d'autres du tiers, et d'autres d'une chose particulière.*"

Whenever relative value has been discussed, it has not been shewn that a donation of less than the sixth part, mentioned by *Cujas*, was ever regarded as "*immensa.*"

The difficulty of defining, as a rule for all cases, the precise

proportion the gift should bear to the whole property of the donor, shewn in the diversity of opinions and decisions upon the subject, no doubt led to the growth of the law which left the revocability of the gift to depend upon the circumstances of each case, and especially upon consideration of the question whether it would have been made if the donor, at the time of making it, had contemplated the birth of children.

The ground of decision just adverted to is found in an *arrêt* of the Parliament of *Bordeaux*, of the 2nd of June, 1570, cited by *Despiesses*, holding that a gift from a lady of 10,000 livres was revocable "*moyennant qu'y ait apparence que le donateur n'eût pas fait telle donation s'il eut pensé avoir des enfans*" (*ubi ante, decimo*).

The principle of this *arrêt* appears to have been sanctioned by jurists and adopted by the Courts. Writers, who are acknowledged to be of high authority, seem to be agreed that it supplied the true rule on the subject.

De Ferrière, in his work on "*La Coutume de Paris*," treating of revocation, says, vol. iii. tit. 13:—

"*Cette question, à mon avis, ne se peut décider que sur les circonstances qui se tirent des biens du donateur, des choses données et de leur valeur, et de la personne du donataire; il faut examiner si le donateur n'auroit pas donné, s'il avoit sçu avoir des enfans.*"

Ricard, Traité des Donations, part 3, c. 5, sec. 4, after discussing the diversity of opinion which had existed, lays down the same rule as *De Ferrière*, but with greater fulness:—

"*Je dis donc qu'il ne faut pas considérer si la donation est de la moitié, du tiers, du quart, ou de la sixième partie de tous les biens du donateur, ou même d'une chose singulière, mais que le point décisif consiste dans cette discussion qui s'emprunte des particularités des espèces qui sont à juger (cette matière étant entièrement dans les présomptions) de voir et examiner si vraisemblablement le donateur eût fait la donation, s'il eût eu des enfants au temps qu'elle a été passée; si elle est considérable pour les biens qu'il possédoit, et si regardant le donateur comme une personne prudente, on doit juger qu'il ait dû raisonnablement faire la donation dont il s'agit, en examinant dans le particulier si c'étoit un proche parent ou un domestique dont la considération ait pu porter le donateur à exercer cette libéralité; ou*

J. C. 1880 SYMES v. CUVILLIER.

bien si la chose donnée est de petite considération, en égard à ses biens et à ses facultés, pour discerner s'il y a apparence qu'il eût fait cette donation supposé qu'il se fût vu chargé d'enfants, pour déterminer en ce cas qu'elle n'est pas révocable, ou bien que la loi y doit avoir lieu, si la présomption se trouve au contraire. Et de fait dans les arrêts qui ont été rapportés ci-dessus, et par lesquels les donations ont été déclarées révoquées par survenance d'enfants les unes étoient de la moitié, les autres du tiers, et les autres d'une chose particulière."

Fourgole, in his Treatise on the Ordinance of 1731, in discussing the law as it stood before that Ordinance, considers that the soundest view of it was taken by *Papon, Ricard, De Ferrière,* and the other writers who maintained the principle of decision found in the passages last above cited; and after giving the effect of the passage just cited from *Ricard,* he adds:—

"*C'était, à notre avis, la meilleure règle qu'on pût suivre dans cette matière, qui n'étant pas fondée sur la disposition expresse de la loi, mais seulement sur l'équité appuyée sur son esprit, étoit purement conjecturale, cependant elle avoit cet inconvénient, qu'elle rendoit la décision arbitraire, mais pour faire cesser cet inconvénient M. le Président de Lamoignon, dans ses arrêtés au titre des donations, Article* 50, *avoit cru que la donation d'une quote ou d'une chose particulière dont la valeur n'alloit pas au quart des biens du donateur au temps de la donation, ne devoit pas être révoquée.*"

It is to be remarked that *Fourgole* in this passage states distinctly that the rule in *France* was not founded on the express disposition of the law, but on an equity resting upon its spirit, and their Lordships consider this to be the correct view.

The *arrêté* (Art. 50) of President *Lamoignon* referred to by *Fourgole* is in these terms:—

"*Donation de chose singulière, ou par quotité au-dessous du quart des biens qu'avait le donateur au jour de la donation, n'est point révoquée par survenance des enfants, mais si elle est du quart ou au-dessus, ou d'une chose singulière valant le quart des biens ou au-dessus, elle sera révoquée pour le tout.*"

Great reliance was placed by the learned counsel for the Respondents on this *arrêté,* as a declaration of the law settled by the jurisprudence of the Parliament of *Paris.* The great authority of

De Lamoignon, who was first President of that Parliament, was fully acknowledged, but it was denied that the *arrêtés* were statements of the actual law; they were said to be determinations of what the law should be. Assuming this to be so, there is some reason to suppose, from *Lamoignon's* preliminary inquiries and proceedings before publishing his *arrêtés*, that he evolved the principle of *Arrêté* 50 from decisions of the Parliament of *Paris*. The jurisprudence having taken a direction which left the question to be determined in each case by the Court on the view of its circumstances, had produced uncertainty, and this inconvenience he wished to prevent by a definite rule.

Whatever may have been the diversity of opinions and decisions on the subject, the general effect of them points irresistibly to the conclusion that before the Ordinance of 1731, the Roman law, "*Si unquam*," had not been introduced in all its fullness in *France*, at least into that part of it within the jurisdiction of the Parliament of *Paris*. It seems to their Lordships that, before that Ordinance, the law had, in effect, become this, that donations were not revoked by the birth of children, when the property given was not of large value in relation to the entire estate of the donor, and it could be presumed, from the circumstances of the particular case, that the gift would have been made if the donor had contemplated the birth of children. These questions in case of dispute would, necessarily, be decided by the Courts.

It was urged that a rule which required the decision of a Court on these questions could not be the true one, as being inconsistent with the principle which implies the existence of a resolutive condition in the gift itself; but this is really not so, for if the rule be as above supposed, the legal effect of it would be, that in a given state of facts the law did not attach the resolutive condition to the gift, but when that state of facts did not exist it did attach it. The determination by the Courts of the question of fact in no way changes the legal nature of the condition (if there be one) as a resolutive condition. When the facts are found in one way, the law implies that the gift was always unconditional, whilst, if found in the other, it implies that the condition was always inherent in the gift.

J. C. 1880 SYMES v. CUVILLIER.

In 1731, the Ordinance of *Louis* XV., entitled "*Ordonnance sur les donations*," which adopted to its full extent the law "*Si unquam*," settled the law of *France* upon the subject. By Art. 39 it was enacted that all gifts made by persons who had not children at the time of the donation, "*de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites, . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur.*"

This Ordinance, which was framed after careful inquiry into the existing jurisprudence of *France* by Chancellor *D'Aguesseau*, contains a complete code on the subject of donations, and it was contended, on the part of the Appellants, that it ought to be regarded as declaratory of the existing law. It appears that *D'Aguesseau* formulated certain questions, and sent them, with explanatory letters, to all the Parliaments. Extracts were read from these letters to shew that the Chancellor's object was to reform the discordant jurisprudence of the Courts, so that the law throughout *France* should be uniform. But the jurisprudence of each Parliament had taken root within its limits, forming the law administered there, and their Lordships do not gather from these letters that the Chancellor supposed that the contemplated Ordinance could be a mere declaration of existing law. He selected from the jurisprudence of each Parliament what he considered to be good, and fit to be incorporated into the general law he proposed to frame.

It appears that the Chancellor contemplated the formation of a general code of law, and commenced with the subject of donations as being, in his view, one of the most simple and the least difficult. (See his letter of the 3rd of May, 1730, to M. *de Machault, Conseiller d'Etat*, who was charged with making a *résumé* of the observations of the Parliaments and others upon the questions which had been put to them). In this letter the Chancellor, after stating that all the Parliaments and "*Conseils Supérieurs*" had sent answers to his questions, says, "*Il s'agit à présent de se servir de tant de bons matériaux pour en former une loi*," which should be of a nature to stimulate further exertion in the same direction; and in the same letter he says the object was "*à établir des règles*

certaines et uniformes sur ce qui fait le sujet d'une diversité de jurisprudence."

But, whatever may be the inference to be derived from these letters, the Ordinance contains within itself abundant evidence that it was not intended to be a mere declaration of existing law. It contains some provisions which are undoubtedly new. Thus Art. 45 enacts that the period of prescription shall be thirty years after the day of the birth of the last child of the donor. And Art. 39 itself is more stringent in its details than the law "*Si unquam.*" But Art. 47 is decisive on this question. It repeals "*toutes ordonnances, lois, coutumes, statuts et usages*" contrary to the provisions contained in the Ordinance, and provides that donations made before its publication were not to be attacked under pretext that they were not in conformity with its rules; "*notre intention étant qu'elles soient exécutées ainsi qu'elles auroient pu et dû l'être auparavant, et que les contestations nées et à naître sur leur exécution soient décidés suivant* les lois et la jurisprudence *qui ont eu lieu jusqu'à présent dans nos cours à cet égard.*"

Considering, then, that this Ordinance enacts a new law on the point in question, it would not be of force in *Canada* unless it had been registered there. The Appellants' counsel relied on the injunction of the Ordinance requiring it to be obeyed "*dans tout notre royaume, terres et pays de notre obéissance,*" but a royal Ordinance, published after the establishment of "*Le Conseil Supérieur*" in *Canada* by the Edict of 1663, did not take effect in that province *proprio vigore* until it was registered: *Hutchinson* v. *Gillespie* (1); *Les Sœurs Hospitalières de St. Joseph* v. *Middlemiss* (2).

This Ordinance not having been registered, it was incumbent upon the Appellants to shew that the French law introduced into *Canada* in 1663, and which presumably continued to be the law there, became altered and modified in consequence of the jurisprudence of the province having adopted the rules contained in it. The learned counsel for the Appellants was unable, after great research, to produce any evidence that the law had been thus changed or modified, and, in its absence, their Lordships think that such a change cannot be presumed.

(1) 4 Moore's P. C. 378. (2) 3 App. Cas. 1119.

J. C. 1880 SYMES v. CUVILLIER.

The only authority which the learned counsel could invoke is that of the Commissioners charged with the preparation of the Canadian Civil Code, who in their Report (vol. ii. p. 333) state the law very nearly in the terms of the Ordinance of 1731, to which, indeed, they refer. This authority is no doubt entitled to respect; but the opinion of the Commissioners has not the weight of a judicial opinion, pronounced after discussion and argument; and it is to be observed that the Commissioners, having decided to introduce a new law (opposed to the law "*Si unquam*"), and not the old whatever it was, into the Code, were the less concerned to ascertain with precision what the old law was. Whatever respect, therefore, may be due to the opinion of the Commissioners, their Lordships think, for the reasons already given, that it cannot of itself be regarded as sufficient evidence that the law of the Ordinance of 1731 had found its way into the jurisprudence of *Canada*.

Regarding, then, the law of *Canada* to be that which existed in the jurisprudence of the Parliament of *Paris* before the Ordinance, the question remains whether the gift in question was revocable upon the birth of children. In deciding it, two matters of fact require to be considered, one, the largeness of the gift, the other, whether the donor would have made it if she had contemplated children. On the first point, their Lordships have no difficulty in coming to the conclusion that the gift was not excessive in relation to the property of the donor. It was about the hundredth part of it. Wherever a gift of a part of a donor's property has been discussed and tested with reference to its amount, a proportion so small as this has never been regarded as excessive. It was contended that, in considering this question, the value of the gifts made to the other relations should be estimated; but, though the fact of these other gifts cannot be excluded, and for some purposes it might be very material to consider them, each gift, in the end, must be decided on its own merits. All these gifts, however, if taken together, amount only to about one tenth of the donor's wealth, a proportion less than any share which French writers have regarded as excessive. As already stated, one-sixth is the lowest mentioned by them. Mr. Justice *Ramsay*, in his judgment,

says that he had found no case, where the amount was in question, in which a donation of less than one-sixth was set aside.

Then it is to be considered whether this donation would have been made if the donor had contemplated the birth of children. This question naturally opens an inquiry into the circumstances attending the gift. *Ricard*, in the passage cited above, alludes to those deemed to be material. The value is of course material; so also are the motives of the gift, and the relation of the donees to the donor. The circumstances in this case are, that for many years after her mother's death *La Marquise* lived with her Aunt *Luce*, and in the society of her cousins. It was natural that she should have become attached to them, and, when on her father's death, she succeeded to his large wealth, and to her mother's not inconsiderable property, that she should desire to make some present to them. Her gift is for personal objects, being described to be "*pour partie de leurs frais de toilette et autres petits besoins personnels*," and therefore is of a kind which might well spring from her own wish to gratify her cousins. It is evident that she believed that her mother had expressed a desire that some part, at least, of her property should go to her own relatives. Respect for her mother's wishes and her own affection for her cousins supply ample motives for the gift in question. Considering then the value and nature of the gift, the relationship of the parties, and the motives which might naturally have actuated the donor, there seems to be good reason for presuming that if she had contemplated children she would still have made it. Her letters to her uncle *Maurice*, directing the arrangements to be made preparatory to her marriage, strongly support this presumption. But it is said she did not in fact contemplate having children when she made the gift. The true question however would seem to be, not whether she thought of having children, but whether it can be presumed that if she had thought of them, she would still have made the gift. Even if this be not so, it is difficult to suppose that this lady, possessed of great attractions, and of great wealth, and whose letters display much intelligence and forethought, did not contemplate the probability of marriage. Questions of this kind can only be decided upon presumptions, and their Lordships

J. C.
1880
SYMES
v.
CUVILLIER.

agree with those which have been arrived at by the majority of the Judges in the Court below on this point.

Their Lordships will, for the reasons they have given, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

Solicitors for the Appellants: *Burton, Yeates, & Hart.*
Solicitors for the Respondents: *Freeman & Bothamley.*

[HOUSE OF LORDS.]

BANCO DE PORTUGAL . . . . . APPELLANT;

AND

WADDELL . . . . . RESPONDENT.

H. L. (E.)
1880
March 16, 19.

In re HOOPER AND ANOTHER.

Bankruptcy—Double Proof—32 & 33 *Vict. c.* 71, *s.* 37—"*In whole or in part*" —*Evidence.*

Where traders possess two properties, one situated abroad, and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign Court takes possession of the foreign property, as under a *cessio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad.

Two persons of the name of *H.* carried on trade in *Portugal* as wine exporters, under the style of *H. Brothers*, and the same two persons carried on trade in *London* as wine merchants, under the style of *H. & Sons.* The practice of the business was for *H. Brothers* to draw bills on *H. & Sons.* These bills were accepted in *London* and paid in *Portugal.* The traders fell into difficulties, and in December, 1877, presented a petition for adjudication under the English Bankruptcy Act. Proceedings in insolvency were taken in *Portugal*, after the date of the petition but before that of the adjudication, and the Portuguese Court took possession of the property there, and the Portuguese creditors received a dividend of about 8*s.* in the pound. These creditors then sought to prove under the English adjudication. This was refused otherwise than as a claim, until they had accounted for what they had received under the Portuguese insolvency:—

Held, that this conditional admission of their claim to prove was correct.

Selkrig v. *Davies* (1) followed, and *Ex parte Wilson* (2) approved.

The adjudication had relation back to the petition, from the date of which all the property of the traders abroad and in *England* became vested in the trustee.

The Statutes of Bankruptcy, 1861 and 1869, have no application to a case of two bankruptcies, either in the same country or in different countries, against identically the same individuals.

Per LORD SELBORNE:—The cases of *Maccabe* v. *Hussey* (3), and *Attwood* v. *Small* (4) in no way warranted the supposition that this House would, on appeal, admit evidence not presented in the Court below.

APPEAL against a decision of the Court of Appeal, which had refused the *Banco de Portugal* authority to make, in this country,

(1) 2 Dow. 230; 2 Rose, 97–291.
(2) Law Rep. 7 Ch. Ap. 490.
(3) 2 Dow. & Cl. 440.
(4) 6 Cl. & F. 232.

H. L. (E.) 1880

BANCO DE PORTUGAL v. WADDELL.

a proof of debt against a partnership of two persons named *Hooper*, until the English creditors had received a dividend equal to that which had been received in *Portugal* by their creditors there, under a Portuguese liquidation.

Two persons named *Hooper* had carried on business in *Portugal* under the name of "*Hooper Brothers*," and in *England* under the name of "*Hooper & Son*." The business in *Portugal* was to purchase wine, and in *England* to sell it; and the funds for carrying on the business there, were furnished from *London* by the acceptance of bills, which were drawn in *Portugal* by an agent of the *Hoopers* and accepted here. The firms fell into difficulties; several of the bills were in the possession of the *Bank of Portugal* on behalf of Portuguese creditors.

On the 14th of December, 1877, *Hooper & Sons* presented a liquidation petition to the *London* Bankruptcy Court. On the 2nd of January, 1878, *Hooper Brothers* were declared bankrupt by the Commercial Tribunal of *Oporto* and administrators were appointed under that bankruptcy. On the 10th January, 1878, the English creditors resolved upon a liquidation by arrangement, and appointed *Waddell* the trustee. The administrators in *Portugal* took possession of the property there, and the *Banco de Portugal* received the assets and distributed them to the amount (as it was stated) of 8*s*. in the pound, to the Portuguese creditors. These creditors afterwards claimed to be admitted to prove under the bankruptcy in *England* against the English assets. This was refused by the Registrar in bankruptcy, except as proof of a claim, until the other creditors should have received a dividend equal to the dividend received by the Portuguese bank under the insolvency in *Portugal*. The Court of Appeal had affirmed the Registrar's decision (1). This appeal was then brought.

Mr. *Cookson*, Q.C., and Mr. *Sydney Woolf*, for the *Bank of Portugal*:—

The two claims here are distinct, and exist in respect of distinct and different rights. The two firms, though composed of the same individuals, are distinct firms, and their contracts are distinct. The one firm, the Portuguese firm, carried on the

(1) 11 Ch. D. 317.

business of a purchaser of wine—that wine was transferred, that is, sold to the other, the *London* firm—and a debt was thereby created. One firm drew bills of exchange, the other accepted those bills. The drawing of bills of exchange, and the accepting of them, are distinct acts, the contracts of drawer and of acceptor are distinct contracts, and give rise to distinct rights and remedies in the holders of the bills. The case is therefore one which is entirely within the 37th section of the *Bankruptcy Act* of 1869. The old law as to double proof had been declared in *Goldsmid* v. *Cazenove* (1), but it was felt that that case laid down too rigid a rule, and the *Bankruptcy Act* of 1861 (24 & 25 Vict. c. 134), was passed to remedy it. The object of that Act was to remove objections and to favour the allowance of double proof. That Act (sect. 152) declared that "if any debtor be liable on any bill of exchange or promissory note, in respect of distinct contracts, as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, the circumstance that such firms are, in whole or in part, composed of the same individuals shall not prevent proof, and receipt of dividend, in respect of such distinct contracts, against the estates respectively liable on such contracts." One phrase in that enactment occasioned some perplexity, and the *Bankruptcy Act* of 1869 (32 & 33 Vict. c. 71), altered the words in an important manner, and altered them in favour of double proof; it enacted, sect. 37, that if "any bankrupt is liable, in respect of distinct contracts, as member of two or more distinct firms, the circumstance that such firms are, in whole or in part, composed of the same individuals, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts." All the difficulty that might possibly arise from the use of the words "distinct estates to be wound up in bankruptcy" was thus got rid of—the whole liability was referred to "distinct contracts," and the liability as to them was to be satisfied out of "the properties respectively liable upon such contracts." Those words clearly embraced the present case. Here were "distinct contracts," *Ex parte Adam* (2), which was all that was necessary

(1) 7 H. L. Cas. 785.

(2) 1 V. & B. 493; 2 Rose, 36; see *Bank of England* v. *Graves*, Ibid. 82.

H. L. (E.) 1880 BANCO DE PORTUGAL v. WADDELL.

to give rise to the application of the section: *Lindley* on Partnership (1); and there were "properties respectively liable:" *Ex parte Honey* (2), where double proof was allowed in the case of a note signed by two members of a firm, by that firm, and by some other persons. That case was expressly acted on in *Ex parte Stone* (3); *Lacey* v. *Hill* (4) was referred to.

The case of *Ex parte Wilson* (5), which was relied on in the Court below, does not govern the present. It was decided on the 152nd section of the earlier, and not on the 37th section of the later Act. It is besides distinguishable on the facts. There the two nominal firms consisted but of one sole person—there could be no "distinct contracts" made by himself with himself, and there could be no "properties respectively liable on such contracts," for all the property belonged to him alone. In that case Lord Justice *Mellish* relied (6) on there being "only one debtor," which of course rendered it impossible that there could be "distinct estates to be administered in bankruptcy": *Ex parte Adamson, In re Collie* (7) was also cited. The receipt of the assets in *Portugal* must be treated as a payment, made by the *Hoopers*, on account, before the date of the adjudication in bankruptcy.

The petition for liquidation did not absolutely vest in the after-appointed trustee the whole of the properties of the bankrupts wherever situated: *Ebbs* v. *Boulnois* (8); *In re Bennett's Trusts* (9); it was not in itself a *cessio bonorum*. The proceedings in *Portugal* had that character. *D'Epinay* v. *Cockerell* (10), and *Cockerell* v. *Dickens* (11), shew that the effect of a *London* bankruptcy is not to be carried back by relation so as to override an Indian insolvency; and in *Ex parte The Postmaster-General, In re Bonham* (12), the doctrine of relation was held to be restricted so as to allow certain property to remain in the bankrupt instead of passing to the trustee.

[There was a proposal to lay before the House certain evidence which had not been admitted or considered in the Court below,

(1) Vol. ii. pp. 1212–1215.
(2) Law Rep. 7 Ch. Ap. 178.
(3) Law Rep. 8 Ch. Ap. 914.
(4) Law Rep. 8 Ch. Ap. 441.
(5) Law Rep. 7 Ch. Ap. 490.
(6) Ibid. at p. 493.
(7) 8 Ch. D. 807.
(8) Law Rep. 10 Ch. 479.
(9) Ibid. 490.
(10) 1 Moo. P. C. 103.
(11) 3 Moo. P. C. 98.
(12) 10 Ch. D. 595.

and *Maccabe* v. *Hussey* (1), and *Attwood* v. *Small* (2) were referred to, as shewing that there were instances in which the House would look at documents known to exist, but which had not been used when the case was originally heard.]

Mr. *De Gex*, Q.C., Mr. *Benjamin*, Q.C., and Mr. *McCall*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, in this case I think your Lordships will not desire to hear the counsel for the Respondent, and that you all share the opinion, which I certainly entertain, that the decision of the Court of Appeal was in all respects correct. My Lords, so far as the Court of Appeal was concerned it had, as it seems to me, virtually decided the same question in the case of *Ex parte Wilson* (3), which has been referred to in the course of the argument, but as this House is not bound by that decision, and as the Appellants have challenged, to a certain extent, the principles upon which that case was decided, it is necessary that I should ask your Lordships to look, for a few moments, at the facts of the present case, and consider the law applicable to those facts.

The facts of the case, so far as it is necessary to mention them, appear to be these. There are two persons who carry on business in *London* as wine merchants, under the style of *Hooper & Sons*, and the same two persons carry on business at *Oporto* as *Hooper Brothers*, the business at *Oporto* being the purchasing of one particular kind of wine from the producers, in order that it may be sent to *London* and sold in the general business of the firm in *London*. They keep, as obviously it would be convenient to do, separate books, and in those books a commission is charged as between one firm and the other, but it does not appear that the house at *Oporto* has any capital whatever for carrying on the business there, beyond that which is provided through the medium of the negotiation of bills of exchange, by the acceptances of the house in *London*. Under those circumstances,

(1) 2 Dow. & Cl. 440. (2) 6 Cl. & F. 232.
(3) Law Rep. 7 Ch. Ap. 490.

H. L. (E.) 1880 BANCO DE PORTUGAL v. WADDELL. Earl Cairns, L.C.

for the purpose of paying for certain port wine purchased in *Portugal*, bills of exchange are drawn by the *Oporto* house, by these two merchants trading at *Oporto* under the name of *Hooper Brothers*, upon themselves trading in *London* under the name of *Hooper & Sons*, and the present Appellants are the holders of some of those bills. The two merchants trading in *London* under the name of *Hooper & Sons*, present a petition for the liquidation of their affairs; ultimately an order is made upon that petition, and they are to be looked upon now as liquidating upon the principles of the bankruptcy law, and according to that law the order made upon that liquidation will date back, in its effect, to the time of presenting the petition, subject of course to any right that there may be on the part of particular persons to exempt certain specified and protected dealings from the operation of that retrospective action of the law. After that petition was presented here, proceedings were taken, and a bankruptcy was declared in *Portugal*, against the same two persons trading there, as I have said, as *Hooper Brothers*, and there was a *cessio bonorum*, under which *cessio bonorum* the present Appellants have gone in and proved their debt, that is to say, against those two persons trading at *Oporto*, as the drawers of the bills, and they have received dividends which, for the purpose of the argument, I will take to amount to 8*s.* in the pound; and then these holders of the bills, the Appellants, come to this country, and say to those who are liquidating the affairs of the traders in this country, We demand to prove as against the estate here, for the reason that the traders here were the acceptors of those bills of exchange.

Now, my Lords, altogether apart from statute, so far as I know, there never was a time in the administration of the bankruptcy law at which the holders of bills of exchange would not have been entitled to prove here against an estate so being administered; the only question would be the terms upon which they would be admitted to prove. I wish to look at the case without regard to the Act of 1861, or the Act of 1869; and I repeat, as I understand the law, it would at all times have been perfectly competent to the holders of those bills, having received under the bankruptcy administration in *Portugal* a certain dividend, to come and prove upon the bankruptcy administration in *England*, if a bankruptcy

administration was taking place here, and the only question would be the terms upon which they should prove. And, my Lords, that right would have existed without introducing into the case the element of the same persons being both drawers and acceptors of the bills of exchange. If the debtors had been liable only in one capacity, there would have been that right of proof in the creditors after the receipt of the dividend in *Portugal*. But upon what terms would that right have existed? The terms are laid down by a decision of your Lordships' House in the case of *Selkrig* v. *Davies* (1); the terms are perfectly clear that a person who after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in *England*, he may do so; but he must do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord *Eldon*, "It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad;" and Lord *Eldon* goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in *England*, would not be obliged to bring this sum in to the common fund—he might keep it if he liked—he might ignore the English bankruptcy altogether if he pleased; but if he did not ignore it, if he sought to take advantage of it, if he sought to have some benefit from it, then, on the principle that he who asks for equity must do equity, he must bring into the common fund that which he had already received in respect of the obligations of the same debtors. That is the case as the matter would have stood apart from the statutes. Now, have the statutes made any difference in the case? My Lords, the statutes create no new right in the way of giving a right of proof, but they profess to take out of the way a difficulty which existed in certain cases against double proof, and to say that certain things shall not prevent double proof; but as I read the statutes—and I will take the one which the Appellants think most favourable to themselves, the statute of 1869—I cannot see that it has any application whatever to a case of two bankruptcies, either in the same country or in different countries, against the same identical individual or individuals. The statute supposes a case where there are two

(1) 2 Dow. 230; 2 Rose, 97, 291.

H. L. (E.) 1880 BANCO DE PORTUGAL v. WADDELL. Earl Cairns, L.C.

contracts and also two firms, or an individual and a firm. I do not in the least see the difficulty which has been felt with regard to the use of the words "in whole." What I take that to mean is this—the statute supposes a case where, we will say, *A.*, *B.*, and *C.* are trading as one firm, and there is another firm, in which the whole of those members are found, consisting of *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, that is a case which is pointed at by the words "in whole." But there may be another case: *A.*, *B.*, and *C.* may be trading as one firm, and the whole of those may not be found in the other firm, only two of them or only one of them may be found in the other firm, that would come under the words "in part." There may be, thirdly, the case of a sole trader, who is found also trading in a firm with other persons. But what the statute says is this: "If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts." That supposes a case which it seems to me is perfectly foreign to the present. This is simply the case of one bankrupt firm. It happens to be two persons trading together in *Portugal* and in *England*, but it is just the same case as if it were one person trading in *Portugal*, and the same person trading in *England;* the two persons do not constitute different firms because they trade in *Portugal* and also in *England;* and there is not that diversity which is necessary to bring the section of the Act of Parliament which I have just read into operation. The case, therefore, stands as it would do altogether regardless of the statute; and that was the decision of the Lords Justices in the case of *Ex parte Wilson* (1) under the former statute of 1861.

My Lords, the result, therefore, is this, that the Appellants are perfectly entitled to prove under the English bankruptcy; but if they elect to do so they must, as was said in the case of *Selkrig* v. *Davies* (2), bring into the common fund what they have received abroad, which is exactly the effect of the order made by the

(1) Law Rep. 7 Ch. Ap. 490. (2) 2 Dow. 230.

learned Registrar, and made by the Court of Appeal. I therefore move your Lordships that the appeal be dismissed with costs.

LORD SELBORNE :—

My Lords, I am entirely of the same opinion, and with respect to the principal question I so entirely concur in the judgment of the Court below and in the reasons assigned for it by the Lords Justices and by the Lord Chancellor, as to think it unnecessary to add anything.

The other point argued by the Appellant's Counsel was that the title of the Appellant Bankers to the goods received by them in *Portugal* was prior in time and paramount in law to the title of the trustee under the English liquidation, and that the Appellants were therefore entitled to prove for the residue of their debt, after deducting what they had so received, in the same way only as if it had been a payment on account, made by the debtors before the presentation of any petition for liquidation. This however, in my judgment, is not so. The Portuguese assets were, by the Law of *England*, which we have to administer, (and, I may add, in accordance with the general principles of private international law as to moveable property,) subject to and bound by the English liquidation, except so far as the local law of *Portugal* might have intercepted any portion of them while within its jurisdiction. Every creditor coming in to prove under, and to take the benefit of, the English liquidation, must do so on the terms of the English law of bankruptcy ; he cannot be permitted to approbate and reprobate, to claim the benefit of that law, and at the same time insist on retaining, as against it, any preferential right inconsistent with the equality of distribution intended by that law, which he may have obtained either by the use of legal process in a foreign country, or otherwise. As against the Appellants, so coming in to prove, and not being within any of the savings contained in the 94th section of the Act of 1869, it is unimportant that the presentation of the petition in December, 1877, was not *per se* a *cessio bonorum* ; because (subject to the exceptions of the 94th section) the Act makes the title of the trustee relate back to the time when the petition was presented, which was before the time when the title of the Portuguese Court to administer the

H. L. (E.) 1880

BANCO DE PORTUGAL v. WADDELL.

Lord Selborne.

Portuguese assets is said to have accrued. The Appellants cannot come in and prove and take dividends out of the English assets, with the full benefit of the relation back of the title of the trustee to the date of the petition, and at the same time set up against that title, a later act of a Portuguese Court, for the purpose of enabling themselves to refuse credit for property belonging to the estate, received by them in *Portugal* after the date of the petition, through the action of that Court. I must not, however, be supposed to think that it would really have made any difference if the action of the Portuguese Court had been earlier, nothing having been received by the Appellants till long after the title of the English trustee had accrued.

I think it worth while to add a few words on the subject of the Appellants' endeavour to introduce upon this appeal evidence which was neither used in, nor offered to, the Court below. Some cases were referred to, one of which, *Maccabe* v. *Hussey* (1), has no bearing upon the point at all. In that case evidence had been rejected in the Court below; the question of the propriety of the rejection of that evidence was raised by the appeal; and the Appellant's counsel insisted that the House ought not to look at the rejected evidence to see whether, if it had been admitted, it would have made any difference or not; but that if it held it to have been improperly rejected it should simply send the case back. The House very properly took a different view of the matter; but it is quite obvious that that had no bearing upon the general question. With regard to the general question, Lord *Lyndhurst*, in the case of *Attwood* v. *Small* (2), following Lord *Brougham*, who used the words which were cited from that case, put the matter upon so proper a footing that it appears to me worth while ta remind your Lordships of what he said (3); "With respect to the cases that have been cited, it does not appear to me that they go far to decide the present question." The question there was whether the answer in the cause, which had not been read or entered as read in the Court below, was to be read in this House. "The case of *Noel* v. *Noel* (4) was a mere question of construction of a will,—there was no dispute as to the facts,—the will having

(1) 2 Dow. & Cl. 440.
(2) 6 Cl. & F. 232.
(3) 6 Cl. & F. at p. 304.
(4) 12 Price, 214.

referred to a settlement, it appeared to the noble Lords who decided that case, that it was impossible properly to determine the construction of the will without looking into the settlement. There was no dispute that there was such a settlement, no dispute as to a question of fact; it would have been idle therefore to have sent it back to the Court below to hear farther evidence and to receive the settlement; the Court therefore called for the settlement." Then he says something more upon the state of things there. It is quite obvious that it was one of the common cases in which the parties on all sides, as well as the House, saw that it would be merely occasioning a most vexatious and improper expense, ending in no good to any body, to object to the House looking at the document. Lord *Lyndhurst* goes on to say, "It is quite obvious therefore that it was a mere question as to the construction of the instrument, and it did not turn at all on a disputed fact. With respect to the other case which has been cited from *Brown's* Parliamentary Cases" (which was a case in 1717), "the facts are so obscurely stated that it is quite impossible to place any sufficient reliance upon it. I think, therefore, the general rule ought to prevail in this case, namely, that as this evidence was not tendered in the Court below it ought not to be offered before the Appellate tribunal." And I must add that in the whole of my experience, which extends over a considerable period of time, such a thing never has happened as that this House has allowed any evidence to be introduced which was not used in the Court below.

LORD BLACKBURN:—

I am also of opinion that in this case the judgment below is quite right, and that it is not necessary to hear the Respondents. I will say nothing upon the question as to what would have been the case supposing sect. 37 of the Act of 1869 or sect. 152 of the former Act had not been passed, except that I quite agree with the reasons that have been given by the Lord Chancellor for holding that, supposing the proceedings had been under the bankruptcy law before those Acts came into operation, the proof here would have been properly made, conditional, however, upon this, that before any dividend was received upon it, there should be

H. L. (E.) 1880 BANCO DE PORTUGAL v. WADDELL. Lord Blackburn.

allowance made for all that had actually been received. But then it is said that sect. 37 of the Act of 1869, which extends the effect and somewhat alters the language of sect. 152 of the foregoing Act, makes a difference. That I cannot agree to; I think that sect. 37 properly construed does not apply to this case at all. It is to be remembered what was the principal object with which that section and sect. 152 of the Act of 1861 were enacted, and what it was wished to remedy. At Common Law, when no bankruptcy intervened, if a man had a claim for £100 arising out of a contract in which two firms or two sets of persons were concerned, one individual being common to both the firms, as, for instance, if a firm consisting of *A.* and *B.* drew on a firm consisting of *B.* and *C.*, there is no doubt whatever that the man would have had his action against *A. & B.* as drawers, to recover his £100, and his action against *B. & C.* as acceptors; and if he recovered judgment upon either one or other of those, he could have levied his execution against the estates of both the contracting parties, and the fact that one of the contracting parties who had contracted, say as acceptor of the bill, was also a person who had contracted as drawer for the same sum of money, would have had no effect upon his right to issue execution against the estate and property of the firm *B. & C.* who had accepted the bill, as well as against the estate of the firm *A. & B.*, who had drawn the bill. Such would have been the effect at Common Law, but when bankruptcy intervened, there was introduced, for motives of convenience, I believe, a rule of bankruptcy which became established, and completely established, as the law, so that it could not be altered without the intervention of the Legislature, by which, where there were two contracts for the same matter, as I have supposed in the case of *A.* and *B.* and *B.* and *C.*, where there was one common partner in both firms, though there might be proof against each of the estates, yet there was not to be a dividend received from each of those estates; the creditor must elect which he would go against. That seemed always to me to be a very great hardship and anomaly, which should not have been introduced originally, and the Legislature has by two successive Acts partially removed that which seemed to me to be an injustice—but this has not been done entirely. Where there are not two separate

firms the old rule would still remain untouched that the creditor must elect which estate he would go against; in all other cases those two sections of the Acts of 1861 and 1869 would apply. As I say, those sections were intended to take away that anomaly and injustice to which I have referred, and it was for that purpose alone that they were intended.

Now the first Act (the Act of 1861), which applied only to the case of bills of exchange and notes, provided that, "if any debtor shall at the time of adjudication be liable upon any bill of exchange or promissory note, in respect of distinct contracts, as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts." That was the section which had to be construed in *Ex parte Wilson* (1), and there it was very satisfactorily pointed out, as it seems to me, that though there were two firms, though there were two distinct names for the firms, and though there were two distinct businesses, yet if the fact was that all the members of the firms were the same, there was no need for the section at all, there was no double proof to which the creditor would have been entitled if it had not been for the rule to which I am referring. It would have been one estate to be wound up in bankruptcy, one estate which was to be administered, and one proof that was to be made; and there was nothing there to hinder and nothing to take away. By subsequent legislation it was extended from bills of exchange and notes and made to apply to to all cases of contracts where debtors were liable, in respect of distinct contracts, as members of two or more distinct firms, and then the words, "carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy," are dropped out, and it goes on to say, "or as a sole contractor and also as a member of a firm, the circumstance that such firms are

(1) Law Rep. 7 Ch. Ap. 490.

H. L. (E.) 1880 BANCO DE PORTUGAL v. WADDELL. Lord Blackburn.

in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors shall not prevent proof, &c." The words to which I have referred, in the earlier part of the section, evidently under the idea that the words were superfluous, and that brevity is of more importance than clearness, which is a common error on the part of draftsmen, were struck out. Then it goes on, "shall not prevent proof in respect of such contracts;" the former section ran, "shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts." Under the same mistaken idea that it is better to be short and obscure than long and clear, the words "and receipt of dividend," and the word "distinct" are struck out, and the section of the Act of 1869 reads, "shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts."

Now, the only argument that it ever seemed to me could be urged on that section was, that the words to which I have referred having been struck out, the words "such firms are in whole or in part composed of the same individuals" applied to the case where there are two distinct firms consisting entirely of the same identical individuals, and I think that the words "in the whole" would be capable of bearing that meaning if the context did not preclude the possibility of their bearing it. But I also think those words are capable of applying—and from the context I think that they do apply—to a case where the firms are not throughout composed of identically the same members, but where one of them embraces the whole of the others. To make one's meaning clearer, say that one firm is *A.*, *B.*, and *C.*, and the other is *A.* and *B.* There I think you may say that the firm *A.* and *B.* "in the whole" formed part of the firm *A.*, *B.*, and *C.* I think the words apply to that case, and would not apply to a case where the firms were identical. That is a verbal criticism, rather than anything else, and I go more upon the ground which Lord Justice *Bramwell* very clearly puts, that this is to take away a prevention, a limitation. That is to say, whereas formerly there would have been a right on the part of a creditor to come and say—I will prove against *C.* for the debt which he has contracted, and I will

come upon *C.'s* estate, and I will prove against *A.'s* estate for the contract which *A.* entered into,—and whereas the rule of bankruptcy to which I have referred to said, Though it chances that *B.* is common to each of those contracts, though *B.* is a contractor with *A.* in one contract, and *B.* is a contractor with *C.* in the other contract, yet you shall not come upon the estate of both *A.* and *C.*, you must elect which you will take, the Legislature by these enactments said, The fact that the firms with whom you have contracted have a partner in common, or are in whole or in part in common, shall no longer prevent you proving against both. But in the case where they were all identical, there was nothing to prevent. Yet though they were all identical, the creditor could not have had the right to prove more than once. It could not be, because they had contracted as drawers, and had also contracted as acceptors, that therefore the creditor was to prove twice for the amount of his bill. He could prove against the same individuals on their becoming bankrupts, and he could prove against them once, and once only; so that there was really nothing to prevent.

It was argued, more perhaps upon the other point of the case than on this, that the proof in the Court of *Portugal* was to be considered as a separate and distinct proof. I could hardly follow that argument. If it was good for anything, it was making out the bankrupts to be distinct persons, though they were not distinct persons. I cannot follow that argument, or admit that it is a good argument in law. It seems to me, as I said before, for reasons which I do not repeat, but which the Lord Chancellor has fully expressed, that the Court of Bankruptcy in *England* had the right to administer all the personal property of these bankrupts, wherever that personal property was, whether in *Portugal* or in *England;* that when a Portuguese subject in any way got hold of part of that property, under the Portuguese law he was entitled to hold it; but when he had so got hold of part of the property, and he came to *England* to take advantage of the proceedings under the *Bankruptcy Act,* he could only do so upon appropriating that which he had received under the Portuguese law in payment of the dividends, and taking no dividends until that sum was exhausted. That is what was held to be the right thing to do in

H. L. (E.) 1880 — BANCO DE PORTUGAL v. WADDELL.

Ex parte Wilson (1), and in the Court below in this case, and as it seems to me that is the right thing to do. I am therefore entirely of opinion that the appeal should be dismissed with costs.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, March 19, 1880.

Solicitors for Appellant: *Michael Abrahams & Roffey.*
Solicitors for Respondent: *Loxley & Morley.*

[HOUSE OF LORDS.]

H. L. (E.) 1880 — *Feb.* 19, 23, 24, 26; *March* 1, 2, 4, 23.

THE NATIONAL BOLIVIAN NAVIGATION COMPANY, THE MADEIRA AND MAMORÉ RAILWAY COMPANY, AND LLEWELLYN NASH . . . . . } APPELLANTS;

AND

WILLIAM MILLAR WILSON, J. H. LLOYD, ALFRED J. LAMBERT, AND THE REPUBLIC OF BOLIVIA . . . . . } RESPONDENTS.

Loan—Failure of Consideration—Foreign Government—Revocation of a Concession—Trustees—Costs.

Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands.

Where there is a right dependent on the practicability of doing a certain work, the question of its practicability is not to be determined solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered.

Thus, where a loan was raised to make a railroad in a foreign country,

(1) Law Rep. 7 Ch. Ap. 490.

such loan being raised on the faith of a prospectus which set forth, as a security to the bondholders, the grant of a concession by the foreign Government, in virtue of which the bondholders would have the benefit of the customs duties imposed by that Government on goods passing along that railroad, and the foreign Government, finding the railroad not made, revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions.

A foreign Government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The Government afterwards revoked the concession:—

Held, that its right to do so could not be questioned in any legal proceedings in this country.

Directions as to the form of the decree and as to costs.

IN this case an action had been brought by Mr. *Wilson*, the holder of bonds in a loan known as the Bolivian Loan of 1872 (for himself and as representing other bondholders), against Colonel *Church*, the *National Bolivian Navigation Company*, the *Madeira and Mamoré Railway Company*, Messrs. *Lloyd & Lambert* (as trustees for the bondholders), and *L. Nash*, claiming a declaration that a large fund, consisting of part of the Bolivian Loan, now in the hands of the trustees, should be returned to the bondholders, and not retained for the purpose of being applied at any future time to payments for the works on the projected railway, if ever such works should come to be executed (1).

The Republic of *Bolivia* lies on the western side of *South America*, and a comparatively small portion of its territory touches the sea coast. On the east and north-east it is bounded by *Brazil*. The *Mamoré* flows through it, taking nearly a northerly direction, and falls into the *Madeira*, which itself falls into the *Amazon*, the waters of which last-named river flow into the *Atlantic*. It had long been thought desirable for *Bolivia* to obtain a direct communication with the *Atlantic*, but to that the two smaller rivers presented obstacles in the form of rapids which rendered their profitable navigation impossible. A scheme was, therefore, devised by which it was at first proposed to canalise

(1) The case came several times before the Courts, changes of parties occurred, and ultimately the parties who appeared at the Bar of the House of Lords were those whose names now stand at the head of this report. In the Courts below the case was called *Wilson* v. *Church*, the final judgment in which was given 13 Ch. Div. 1, where the facts are given in full detail

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

the two smaller rivers in the parts affected by the rapids, but this scheme was abandoned, and it was proposed to avoid the rapids altogether, by uniting the parts of the rivers *Mamoré* and *Madeira* above and below these rapids, by means of a railway.

Colonel *Church*, an American engineer, having obtained the ready acquiescence of the Bolivian Government to this scheme, started the two companies which now appeared as Appellants. He obtained the necessary concession from the Bolivian Government, which took a deep interest in the success of the scheme, to forward which it consented to grant the customs duties on goods imported into *Bolivia* through the *Amazon*, undertaking not to alter those duties so as to impair the security given to those who should establish the desired communication.

As part of the proposed communication, namely, the railway itself, must pass along territory wholly Brazilian, application was made to the Government of *Brazil* for a concession. That was granted; and the Brazilian Government promised certain pecuniary assistance when the railway should be completed. The two companies, now Appellants, were formed for the purpose of carrying this scheme into effect, but it did not appear that they had any subscribed capital. Recourse was had to *Europe*, and a loan of £1,700,000 was set on foot in *London* in 1872, to enable the works to be constructed, and part of that loan (originally £600,000, but now stated to amount to above £800,000) was vested in Messrs. *Lloyd & Lambert*, as trustees for the lenders, the bondholders, to be disbursed by these trustees in payment for the works of the railway, as portions of those works should be from time to time completed. It was arranged at the time of raising the loan that the railway should be constructed in two years. At the present time its construction had not been begun.

The *Navigation Company* had entered into a contract with a *Public Works Construction Company* to make the railroad, but there had been a suit between the *Construction Company* and the *Navigation Company* respecting the non-performance of this contract, which the *Construction Company* repudiated as having been obtained by misrepresentation. That suit was compromised. There was also a suit by the *Navigation Company* against the trustees; and, on the 11th of December, 1874, the Master of the

Rolls decreed that the company was entitled to have the trust fund applied from time to time in payment for the works referred to in the Brazilian concession as such works proceeded, without prejudice to the rights of the Republic of *Bolivia*, which was not a party to the suit. The *Navigation Company* afterwards entered into a contract known as the *Collins* contract for the execution of the works. No works were executed.

There was a suit by a Mr. *Cooper*, a bondholder, on behalf of himself and others, against the trustees of the fund, the two present Appellant companies, and Colonel *Church*, in which suit it was not alleged that the works were impracticable, but it was prayed, if they should become so, that the trust fund should be returned to the bondholders. There was also a suit by the Republic of *Bolivia* against the same parties (to which no bondholder was made a Defendant), praying that the Republic might recover the trust fund, being entitled thereto upon the repudiation of the contract by the *Construction Company*. Both these suits were, by the Master of the Rolls, dismissed with costs on the 22nd of November, 1876. These were the decrees which the present Appellants insisted on as shewing that the whole matter was *res judicata* as to any rights of the bondholders. The Republic had, after the revocation of the concession, made over to the bondholders any claims it might have upon the loan.

The two Governments of *Bolivia* and *Brazil* (the former under a resolution of the Legislature carried into effect by Señor *Quijarro*, its minister in *London*) had withdrawn their concessions, and the bondholders generally (Mr. *Nash*, who held possession of certain of the bonds, dissented from the proceedings of *Wilson*) now applied for a return of such of the money as still remained in the hands of the trustees, alleging that the whole scheme had become abortive. This case had been several times before the Court of Chancery—in May, 1878, before the Master of the Rolls on a question of parties to a proceeding in discovery (*Wilson* v. *Church* (1)); in April, 1879, when Mr. Justice *Fry* dismissed the action of *Wilson* v. *Church* with costs, and ordered the trustees to pay a sum of £7266 10*s*. 4*d*. to the contractors of the railway

(1) 9 Ch. D. 552.

H. L. (E.) 1880

NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

company (1); in May, 1879, before the Court of Appeal on a question of staying proceedings pending that appeal (2).

In May, 1879, the judgment of Mr. Justice *Fry* was reversed by the Court of Appeal, and the fund in the hands of the trustees ordered to be distributed among the bondholders (3). An appeal was then brought to this House. The case was afterwards heard in July, 1879, before the Court of Appeal on the question of staying the distribution of the fund pending the appeal to this House (4). The order for staying the distribution of the fund was made, and the appeal was then carried on. It now came on for hearing.

Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Rigby*, were for the Appellants.

The Solicitor-General (Sir *H. Giffard*), Mr. *Southgate*, Q.C., Mr. *Fooks*, Q.C., and Mr. *Cozens-Hardy*, appeared for the Respondents, the bondholders.

Mr. *Macnaghten*, and Mr. *Snagge*, were for the trustees.

The contention of the Appellants was, that the decrees of the Master of the Rolls in November, 1874, and December, 1876, had really decided the whole of the case, which was therefore to be treated as *res judicata*, that all the facts of the case were before that time known to the Plaintiffs in the cause. *Manchester Mills* (5), *Adair* v. *New River Company* (6), *Hunter* v. *Stewart* (7), and *Commissioners of Sewers* v. *Gellatly* (8), were cited. It was denied that Señor *Quijarro*, who had in form pronounced the revocation of the Bolivian concession, had been properly authorized to revoke it, or that the Bolivian Government had the right to revoke it, and it was contended that, even if that revocation must be supposed to have taken place, still it could have no effect on the rights of the Appellants, who continued entitled to receive portions of the fund now in the hands of the trustees, as portions of the railway should, from time to time, be constructed.

(1) 11 Ch. D. at p. 577.
(2) Ibid. 576.
(3) 13 Ch. D. 1.
(4) 12 Ch. D. 454.
(5) 1 Doug. 222, n.
(6) 11 Ves. 429.
(7) 4 De G. F. & J. 168.
(8) 3 Ch. D. 610.

The Appellants asserted that the making of the railway was not impracticable, or, at all events, had not been shewn by the Plaintiffs to be so, though the burden of proving that impracticability lay on the Plaintiffs; that the Appellant companies could not now be restored to their original position; that a majority of the bondholders could not, without the assent of the rest, rescind a contract originally binding on all; and that the rights of third parties were injuriously affected by the decree now appealed against.

At the conclusion of the arguments for the Appellants the Lords adjourned the farther consideration of the case. On the day appointed for its again being heard, their Lordships did not call on the counsel for the Respondents, but proceeded to deliver judgment.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, in this case your Lordships heard at great length the able and elaborate arguments of the learned counsel for the Appellants, and you then adjourned the farther hearing of the case in order that you might consider these arguments and determine whether it would be necessary to call upon the Respondents. I think your Lordships are now satisfied that, subject to a question as to the form of the decree in the Court below, the Appellants have been unable to make out any case for disturbing the substance of that decree, and I will proceed to state to your Lordships, as I can do in a moderate compass, the reasons which lead me to concur in that opinion.

My Lords, the Plaintiffs in the action out of which the appeal arises may be taken to be the bondholders, or the bondholders with one exception, in a foreign loan called the Bolivian Loan, originated in the City of *London* in the year 1872. The borrowers were the Republic of *Bolivia*, who are Respondents in this appeal. If the loan had been paid over into the hands of the Republic of *Bolivia*, the borrowers, the questions which have produced the litigation in the present case could not have arisen. The money, however, was not paid over. It was placed *in medio* in the hands of trustees for the bondholders. I think it obvious that if the money had not been placed in the hands of trustees the loan would

H. L. (E.) 1880 — NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. — Earl Cairns, L.C.

not have been obtained. The main question in the appeal is, whether, looking to the objects for which, and the trusts upon which, this money was placed in the hands of the trustees, and looking also to the circumstances which have since occurred, the bondholders have a right to require the repayment of it, or of so much as remains, and to put an end to the trust. The Court of Appeal has decided that they have this right.

I must remind your Lordships of the terms on which this money was asked for. I do not propose to go at length into the history of the case which has been so fully laid before your Lordships; but I prefer to ask your attention to the prospectus of the loan on the faith of which the bondholders advanced their money.

It states that the loan was to have an accumulative sinking fund of 2 per cent., which was to be applied by yearly drawings by lot on the 1st of October, so as to redeem the whole in twenty-five years. It states that the principal object of the loan was to subsidise the *National Bolivian Navigation Company* formed under concession from *Bolivia* for the purpose of opening communication between that Republic and the *Atlantic Ocean*. It states that the new route would be established by means of steamers and a railway about 150 miles in length around the rapids of the *Madeira*, for which the Brazilian Government had granted a concession for fifty years to the *Madeira and Mamoré Railway Company*, of which the *Navigation Company* was practically the exclusive proprietor. It states that the *Public Works Construction Company, Limited*, who had had the line examined, had entered into the contract for the construction of the railway, and the same was to be completed and equipped within two years. It states that the loan was guaranteed by the general revenues of the Republic, and by a first charge on the entire custom dues collected on imports into *Bolivia viâ* the *Amazon River*. It states that the *National Bolivian Navigation Company* had executed a deed granting to trustees for the bondholders a first charge over its net revenue from every source, and that *Lloyd* and *Wanklyn* would act as trustees for the bondholders to execute, if ever required, the powers given for the protection of the bondholders; that they would also retain out of the proceeds of the loan as received, a sum equal to the contract price of the railway, and invest and apply the same in payment of the

works as they proceeded; that they would also retain and invest the amount of one drawing of the loan and three interest coupons so as to cover the period fixed for completion of the railway and works. It states that copies of the official documents and contracts might be inspected at the office of the solicitors, and a reference is made to an accompanying statement of the Government agent of *Bolivia*, calculating the custom dues at a minimum of £236,000, and the net income from the navigation and railway at £93,000, the amount required for interest and sinking fund on the then loan being £136,000.

Among the official documents thus referred to and offered for inspection, was a contract with the *Public Works Construction Company* for a sum of £600,000.

My Lords, there is not, I think, any difficulty in discovering from this prospectus and the documents it refers to, what were the leading conditions under which the bondholders advanced their money; to secure the observance of which conditions the money was placed *in medio* in the hands of trustees, in place of being handed over at once to the Bolivian Government.

In the first place, the Brazilian concession of the railway, which was a leading feature, if not the principal feature in the undertaking, was a concession limited to fifty years, and the security therefore was a wearing out security, and time an essential element. There was to be payment of interest from the 1st of January, 1872, and there was to be an accumulative sinking fund of 2 per cent. applied by yearly drawings, commencing the 1st of October, 1873, so as to redeem the whole loan in twenty-five years. Here again, time was an essential feature.

The bondholders had what may be termed the material guarantie that the *Public Works Construction Company*, solvent, and of reputation, had entered into a contract to construct the line for a definite sum of money, and within two years. The loan and its security are based upon the concession, by the Bolivian Government, of the exclusive privilege of navigation in *Bolivia*, and of a first charge on the entire custom dues collected on imports into *Bolivia* by the *Amazon River;* and specific calculations are given as to the annual amounts that would be produced under this concession from the custom dues, and from the navigation.

H. L. (E.)
1880
NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.
Earl Cairns, L.C.

In addition to the statements on the foregoing heads, which are distinct and unequivocal, it is difficult to read the prospectus and the relative documents without inferring from them that the *National Bolivian Navigation Company*, formed for the purpose of receiving the Bolivian concession, and the *Maderia and Mamoré Railway Company* formed for the purpose of making the railway, were companies in something more than name, that is to say, that they had shareholders and capital available for carrying the undertaking into effect with the aid of the money advanced by the bondholders.

So far as time is concerned we are now in the year 1880. Nearly eight years have elapsed out of the period to which the concession of the railway was limited. No interest has been paid, and no drawing or accumulation in respect of the sinking fund has taken place since, at all events, 1875. The railway has not been made. The line has not been surveyed and laid out, in the sense in which those words would generally be understood. The *Public Works Construction Company's* contract has come to an end, and it has not in my opinion been replaced by any contract which could be said to bind the contractors to finish the railway for a definite sum or in a definite time. The *National Bolivian Navigation Company* and the *Madeira and Mamoré Railway Company* have not, nor has either of them, any share capital, or any shareholders bound to provide capital adequate to make good the deficiency which it is admitted will exist, and which it is also admitted will, under the most favourable circumstances, be very large, between the amount advanced by the bondholders and the amount which would be required to make the railway. It is said that the Brazilian Government would be ready to pledge its credit in order to effect a farther loan to cover this deficiency; but I do not find any evidence which satisfies me either that the Brazilian Government is bound, or has definitely agreed, to raise a farther loan, or what, if attempted to be raised, would be the result.

Beyond all this, I think it is established by the evidence that the State of *Bolivia*, acting, as it appears to me, not arbitrarily or capriciously, but in the exercise of rights which the persons constituting that Government considered that under the circumstances they possessed, and which I do not think it can be said they did

not possess, have revoked that concession to the *Navigation Company*, which, as it appears to me, was the principal security for the loan and the principal inducement held out to the bondholders to make it.

If under these circumstances the bondholders were helpless; if they were obliged to leave their money unreclaimed in the hands of trustees; if they were unable to come to the Court and to assert that the terms on which they advanced their money were departed from, that the consideration for the loan had failed, that the security for the loan had disappeared, and that in this state of things the money which had been placed in the hands of trustees should be returned to them—if, I say, they were unable to do this, I should have to arrive at the conclusion that the whole trust arrangement, so carefully constructed for the protection of the bondholders, was a simple mockery. In my opinion, however, the bondholders are entitled to this relief, and I think the decision of the Court of Appeal, which gave them this relief, was correct and in accordance with the first principles of Equity.

I do not think it necessary to dwell on the argument that the former proceedings, in reference to this subject before the Master of the Rolls, amounted to *res judicata* between the present parties. The Master of the Rolls stated, in words about which there could be no doubt, that he did not look upon the suit before him as one in which the bondholders were raising the issue that the undertaking had become impossible, and that their money ought to be returned. The bondholders certainly had not raised that issue in that suit, and even if they could, before it came to hearing, have stated, by amendment, facts which occurred after the institution of the suit, and which might have given them some right to relief similar to that which they now ask for, I do not think they were bound, under the circumstances, to make amendments of that kind or for that purpose.

My Lords, I propose to move your Lordships that the decree should be affirmed. But, subject to any observation which the Respondents' counsel may have to make, I should propose to alter the part of the decree which directs the trustees to retain the bonds and coupons. The coupons I think ought to be retained, because they may be detached from the bonds, and are negotiable,

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. Earl Cairns, L.C.

and they represent an amount of interest which cannot be payable. The holders of the bonds however may desire to retain them for the purpose of claiming something *ultra* what they will receive under this decree. I propose that the paragraph of the decree on this subject should run as follows (1):—

"And it is ordered that the said Defendants *Alfred James Lambert* and *John Horatio Lloyd* do indorse upon each such bond the name of this cause, and the date of this decree, and the amount paid on such bond, and the date of payment and the name of the person to whom the payment shall be made, and do retain the coupons attached or belonging thereto, and also (with the consent of the bondholder but not otherwise) the bond itself, and deposit the said coupons, and also such bonds as shall be retained by them with such consent as aforesaid, in the *Bank of England* in the names of Messrs. *Lumb, Wanklyn, & Co.*, and the Bolivian Government."

I do not think this alteration of the decree should make any difference as to costs, which ought to be paid by the Appellants. The trustees of the fund, and the Respondent, who represents the bondholders, ought to have out of the fund any costs they may have incurred beyond what they will receive from the Appellants.

LORD HATHERLEY:—

My Lords, I concur in the decree proposed by my noble and learned friend the Lord Chancellor, and mainly upon the grounds which he has stated to your Lordships.

A great portion of the time which this case has occupied before the House has been bestowed upon that which does not appear to me to be at all a necessary ingredient in the case with regard to the decision we ought at the present moment to adopt. This case does not turn at all upon any supposed delusion practised in

(1) The decree in the Court below contained the following direction: "That the said Defendants *Alfred James Lambert* and *John Horatio Lloyd* do retain the bond or bonds, with the said coupons attached or belonging thereto, in respect whereof payment shall be made, and also indorse upon such bond or bonds the amount paid thereon, and the date of payment, and the name of the person to whom the payment shall be made, and deposit the said bonds with the said coupons in the *Bank of England* in the names of Messrs. *Lumb, Wanklyn, & Co.* and the Bolivian Government."

obtaining the concession in the first place, in issuing the prospectus in the next place, or in obtaining the money of those who are now called the bondholders in the third place.

There can be no doubt that the undertaking was a great undertaking, and was a matter of the utmost importance to the Government which then existed in *Bolivia*. That Government therefore secured the assistance of Colonel *Church*, who had been in the *United States* army, and had been acquainted with schemes of this character. He set about in a very active manner to procure the means of carrying the proposed object into effect. There existed however one great difficulty. The land where it would be most convenient for a railway to be made, as it appeared to those who were best acquainted with the subject, was situated in *Brazil*, not in *Bolivia*. That necessitated some treaty with the state of *Brazil*, and Colonel *Church* set to work to see what could be done with *Brazil*, and when that was achieved the three parties were, first of all, brought into contact, the Brazilian Government, the Bolivian Government, and the parties who were to be invited, by the proceedings which Colonel *Church* recommended, to find funds for the execution of the works.

It was thought desirable by the Bolivian Government and by Colonel *Church* that a company should be formed, the *National Bolivian Navigation Company*, for the purpose of executing these works. That company was formed and incorporated by charter in the *United States*, and its seat was at *New York*. When that was done, came the consideration as to ways and means. Some reflection has been cast upon the conduct of Colonel *Church* in the course of these transactions, which I do not enter into, because I do not think it has anything to do with the grounds of the conclusion at which I feel myself compelled to arrive:— [His Lordship here stated many of the proceedings, and said:—] All this took time, and this makes me say that I am not myself impressed, at this stage of the transaction at least, with any approach to *mala fides*. I think all parties meant to make the railway, and tried their best to make it, although they might have found difficulties in providing ways and means. The Government very much desired to make it. A contract was entered into with the *Public Works Construction Company* to achieve those

H. L. (E.) 1880 — NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. — Lord Hatherley.

works which, after survey, were considered necessary and proper. The works were to be executed within a limited time, which time has unfortunately long since expired. To make the railway it was determined to raise a loan, and the prospectus was issued.

This prospectus bears upon the whole face of it the clearest possible marks that time was in various ways an essential ingredient in the scheme. In the first place, the *Public Works Company's* engagement to do the work in a limited time was made a part of the prospectus, and the documents were offered to be seen and inspected by those who might be desirous of lending their money upon this speculation. According to the usual fashion in documents of this kind the benefits of the work were expanded; I cannot say unjustly, when you consider what the great benefits might have been if the works could have been constructed with the means proposed. When the contract with the *Public Works Company* was placed before the public they would see by it that the railway was to be "constructed, built, and equipped," which means putting in working order ready for a start with passengers or goods, in two years. Six or seven years have elapsed since then. In the next place, there was to be a sinking fund, which implies in itself a period within which the debt is to be worked off. It was to be done by means of taking the interest for the first two years out of the loan itself, that is to say, part of the capital was to be applied in keeping down the interest, and also in paying off any bonds that might be drawn. The bonds were all to be drawn within twenty-five years, and the whole of the money was to be paid off in that time.

All this undoubtedly pointed to time; first, there was the time within which the works were to be executed; secondly, there was the time within which these drawings were to take place and the interest was to be provided; thirdly, to make the thing quite conclusive, by far the main security was to be found in the estimated value of the exclusive privileges, such as those custom dues which were to be made over by the Bolivian Government to this company when it had been constituted. That could not be done unless the railway was made. Of course, therefore, it was all important to the Bolivian Government, which had to repay itself as best might be done, for the terms of the concession, that the

railway should be made in order that these anticipated results of improved traffic should be substantiated, without which repayment would be impossible.

Now, what happened? Everything seemed to be proceeding well and actively until they got to this stage. The money came in from the public. It was arranged and stipulated on behalf of the bondholders, who advanced their money upon the bonds of the company, that the money so advanced should not be placed under the immediate control of the borrowers, the Bolivian Government, but that it should be placed in the hands of trustees, to be laid out from time to time upon the works as they proceeded and were carried out. Mistakes however and miscalculations were made. In this case there were miscalculations, and difficulties were raised that ended in a step being taken on the part of the *National Bolivian Navigation Company*, which I cannot think was authorized by anything that had taken place as between that company and the bondholders. The *Navigation Company* came to an agreement with the *Public Works Construction Company*, by which the latter was to be excused from the performance of the contract of construction upon certain terms, which I do not understand that the bondholders were called upon or asked in any way to agree to, although of course it made a great difference in the nature of their security. A certain arrangement was made with another company, the *Collins Company*, with which I think we have nothing more to do, because we find that there was a total departure from the arrangement originally made with the bondholders, without any authorization on their part. We see, therefore, that a certain amount of financial difficulty had occurred, at that stage, in the arrangement of affairs between the Bolivian Government and the *Bolivian Navigation Company*.

Things having come to that pass there came a crop of litigation, which does not often occur even in the affairs of such a company as this. But this amount of litigation seems to me to have justified completely the step that was taken by Señor *Quijarro*, the agent of the Bolivian Government, in revoking the Bolivian concession. He sent a letter, in which he distinctly and clearly on behalf of the Bolivian Government withdraws all the concessions and grants that had been made, including, of course,

H. L. (E.) 1880

NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

Lord Hatherley.

those grants upon which the bondholders would have had to rely for their principal security,—all those were revoked.

I should have found some little difficulty in dealing with this case if, in coming to this point, I had found that the concession having been, lawfully or unlawfully, revoked, the case was open to the difficulty which was suggested by one of the learned Judges in one of the Courts below, namely, whether the Bolivian Government was or was not justified in withdrawing the concession. In fact, it has withdrawn it. That being so, has this Court any means of directing that the money should be applied to the making of the railway when it knows that, *de facto*, the principal security upon which the money was advanced is gone?

I have come to the conclusion, like my noble and learned friend, that a state of things had arisen in which the Government of *Bolivia* and the bondholders were not bound to wait any longer. In this state of things there was nothing to be hoped from any farther extension of time. There was no undue precipitation on the part of the Bolivian Government or of Señor *Quijarro*. That Government had a right to recall its concession when it saw that the whole thing had come to an end, and in consequence of that recall the original security given to the bondholders was gone.

I do not go into the question as to the alleged *res judicata*, because I think that has been answered by the quotation from the judgment of the Master of the Rolls which has been read by my noble and learned friend on the woolsack.

I really do not think it is necessary for me to add anything farther, for, as to some points which were suggested in opposition to the judgment of the Lords Justices, those questions have been dealt with by one your Lordships [Lord *Selborne*] whose views upon the subject I have had an opportunity of seeing,—views which are expressed by him much better than they would be by myself. I think, therefore, my Lords, that the conclusion of the Lords Justices is correct, although I do not bind myself to every word and sentence in that conclusion with reference to the conduct of the parties. My own opinion is that in the present case there has been a common misfortune, the work has proved to be beyond the strength of those who undertook to perform it, there was a mistake on the part of those who engaged to enter into it, in

regard to the supply of the necessary means by which alone the money could be raised, and by which alone the contract made with the public, as contained in the prospectus, could be carried into effect.

I quite agree also with that part of the proposed decision of your Lordships which applies to dealing with the coupons. For the reasons which have been assigned by my noble and learned friend the Lord Chancellor I think they ought to be impounded to prevent any possible mistake or fraud occurring by means of those coupons getting into the hands of third parties, with reference to whom it might be difficult to shew on the part of those dealing with them, that they were really entitled to them as bondholders, and that they had not been already exhausted and the interest paid. That being so, I think the simplest way is to let them retain their bonds if they think them of any use whatever, which they may be in some cases, the cases of trustees and others who have advanced money, but the coupons should be impounded, so that any one dealing with a coupon will know that he has no chance of having that coupon paid, unless he can make out a clear and satisfactory right to it before the Court.

Upon the whole of the case, my Lords, I agree with what has been proposed for your Lordships' acceptance by the noble and learned Lord on the woolsack. I think it will do ample justice to all the parties concerned in this tedious litigation.

LORD PENZANCE :—

My Lords, I hardly think that there is any considerable question of law involved in this case. The questions which really are involved depend, I think, almost entirely upon a very voluminous state of facts, and the proper conclusion to be drawn from those facts. Therefore, I should, in an ordinary case, have been disposed to leave matters where they are. Nothing which has fallen from the two noble and learned Lords who have preceded me is, in my judgment, in any way to be found fault with, and I agree with all they have said. Had it not been that the amount involved in this case, and the interest taken in it by a large number of people, and the great length to which the arguments have, necessarily, been prolonged, may be considered to have rendered it necessary

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. Lord Penzance.

or desirable that I should briefly express my opinion, I should have been very well content with passing the matter by with a word or two.

But, my Lords, although agreeing with what has been said, I am myself inclined to put the case upon a somewhat different ground. The argument at the Bar, on the part of the Appellants, appears to me to assume this proposition, that the question, Whether this trust could be executed or not, depended upon whether a railway could or could not be made between the two points between which it was intended to be made. Now, my Lords, if that had been the question although I should not have been inclined to advance the proposition that, upon a sufficient body of evidence, it might not be shewn that the making of the railway in question was either physically impossible or practically impossible, because sufficient funds could not possibly be raised to make it,—although, I say, I should not deny that that is a proposition which might be established in a Court of Justice upon sufficient evidence, that is to say, evidence sufficient in character and sufficient in volume,—yet I do not think that the evidence in this case is of that character, or of that volume. Had, therefore, the question been proposed to me, whether this House could decide that the railway was practically impossible to be made, either physically or for want of funds, I should have hesitated before I came to that conclusion.

But, my Lords, I do not think that that is the question. These funds have been deposited in the hands of trustees on the terms that they should pay out of their hands money from time to time as the works proceeded; and the question which first arises in my mind is, What works were intended? Was it intended that this should be a fund for the making of any railway between the two points, no matter how much farther it turned out that the railway must necessarily go, how many miles longer it might be than that which was first intended, and no matter how much more expensive it might be? Was it intended to be used for making a railway between those two points supposing, for instance, that it should turn out that there was a marsh extending for many miles between the two points,—and such a thing was quite possible upon the sort of investigation which had taken place, which appears to have

been of a very transitory and trifling nature, and supposing it had been necessary, in consequence of that or any other physical difficulty, to go some number of miles round, so that the railway, instead of traversing a distance of 150 miles, had had to traverse a distance of 500 miles; and supposing it turned out that instead of costing £500,000 or £600,000 it would cost £8,000,000 or £9,000,000? Is there no alteration that would render the railway to be made a different railway from that for which the money which had been deposited was intended to be paid? My Lords, I can conceive a state of things in which it might turn out that the railway was so different that even the plan of the railway itself might lead to a reasonable conclusion that the trust could not be executed.

But, my Lords, I do not rest upon that. I go farther. I think the trust here created was not to make a railway simply between these two points; it was to make a railway as part of a great system of navigation; it was to connect the two rivers, the *Amazon* on the one side and the *Madeira* river on the other, and so to form a portion, and a portion only, of a long channel of communication between *Bolivia* and the *Atlantic Ocean.* That was the thing that was to be done. My Lords, I can illustrate my meaning upon this head. Let me suppose for a moment that the *Amazon River,* which I believe is on a very grand scale and is not likely to be obstructed by any natural impediment, were in the hands of some government, like the Chinese Government, which refused to permit its navigation, or, let me turn it the other way and suppose that the *Madeira River,* which was in the hands of the Bolivian Government, was not capable of being used for the purpose of the commerce and trade which this prospectus contemplated: suppose the Bolivian Government was satisfied that it had the means of carrying on the commerce of the country to the *Atlantic Ocean* in a much more easy way, and that it would be much more to the interest of the country to confine the commerce of the country to that easier channel, instead of exposing it to the difficulties that might arise from a hostile government in traversing the country of *Brazil:* I am supposing this, not for the purpose of suggesting that it is likely, but for the purpose of testing what it was that the fund which was deposited was to pay for. I confess it seems to

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. Lord Penzance.

me that if for any reason, either at the one end or at the other, this railway ceased to be a connecting link in the chain of communication devised for the trade of *Bolivia*, if that state of things once arose, I should not have thought that the trust could be executed. I should not have thought that it could ever be executed simply by making a railway between the two points in question.

Now let me see what it was that the prospectus held out to the bondholders, upon the faith of which they lent their money:—[His Lordship read it, see *ante*, p. 182.] There the object of the whole undertaking is stated in the broadest possible terms. It was to create a new channel of communication, to be established by means of steamers and a railway about 150 miles in length; so that the steamers were to be just as much a part of the new route as the railway was. And then it goes on to explain what would be the advantages of the scheme to all concerned—to the Government from the facilities for commerce; to the bondholders from the security which the Government was willing to grant them.

That is the description given in the prospectus of the undertaking, the enterprise, the adventure, and particularly of the object for which the bondholders were (if they chose) to subscribe their money. It quite bears out the view which I have been submitting to your Lordships of the intention of the parties, and impresses this trust, from the outset, with the general object not merely of making a railway, but of making such a railway as shall connect the navigation of the two rivers, and shall be competent to constitute a new route for the exit of Bolivian commerce.

Then come the guaranties. There were various guaranties offered to the bondholders. First of all, by the Republic of *Bolivia* guaranteeing the loan by its general revenues. Then it goes on: "As farther security for the loan, the *National Bolivian Navigation Company* has executed a deed granting to trustees for the bondholders a first charge over its net revenue from every source." Now I think your Lordships will find that, in the events that have happened, that is a most material portion of the guarantie which was offered to the bondholders; it was a guarantie of the profits of the *Navigation Company* quite distinct from the railway company. No doubt, under the concession they had obtained, it

was the function and duty of the *Navigation Company* to provide the necessary steamers and the necessary means (as to which I will point out presently more in detail what was expected to be done) for traversing the Bolivian rivers. The profits of the *National Bolivian Navigation Company*, therefore, were pledged to the bondholders. Then it goes on: "The *Madeira and Mamoré Railway Company* has joined in a similar deed, hypothecating its net profits to the same trustees for the same purposes." Therefore the bondholders had first of all the guarantie of the Government, and they also had (I need not refer to the passage) the guarantie of the duties which were to be charged by the Bolivian Government on all commerce on the rivers. They also had the profits of the *Navigation Company*, and they also had the profits of the railway company. Those are the guaranties which the bondholders had offered to them, and upon the faith of having which they advanced their money.

Now, my Lords, in that state of things I may very briefly refer to what happened. The *Public Works Construction Company*, which had undertaken this work, failed to do it. The directors of that company declared that they had been deceived. I have consulted what they state in their bill, but, inasmuch as that never was proved, I pass it by as a mere statement on their part. Nevertheless, the fact remains that they said that they had been deceived, and that they found (and so far they were correct) that the railway, instead of being 150 miles, must be 200 or 230 miles in length; at any rate, evidently much longer than was intended or expected. They said they also found (and this is not denied) that, instead of costing £600,000, it would cost nearly double that sum. However that may be, whether they had been deceived or not by Colonel *Church*, the fact is that they refused to go on with the making of the railway, and they entered into litigation with the *Navigation Company*, and in the end the *Navigation Company* compromised the suit for a sum of money. That necessarily put a stop to the works, and the matter stood over. Then commenced a lawsuit, and I dare say there is a good deal in what the learned counsel for the Appellants have contended, that these lawsuits, in hanging up the fund, did impede them very much in any fresh endeavours to have the railway made.

H. L. (E.) 1880 — NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. — Lord Penzance.

But what really, in my judgment, put an end to the whole enterprise was the withdrawal of the concession by the Bolivian Government. I agree with what my noble and learned friend opposite (Lord *Hatherley*) has just stated. I do not think it is a material question, or indeed a question at all, whether the Bolivian Government was justified in so doing. We have to see whether this trust can be executed, and it is admitted that if it cannot be executed there is a resulting trust in favour of the bondholders. If the Bolivian Government has withdrawn the concession, and cannot be forced to restore the benefits of it, we must deal with the case on the footing of the concession being at an end.

Now, my Lords, that is exactly what has happened. Whether the Bolivian authorities should have done it or not, it is not necessary to say. But the ground upon which they acted may, perhaps, be adverted to for a moment. On the 9th of June, 1873, there was a decree of the Assembly of *Bolivia* desiring the members of the executive to inform themselves of the condition of this navigation enterprise of the rivers of *Bolivia*:—[His Lordship here stated the various matters in the Bolivian Legislature which preceded the withdrawal of the concession.]

My Lords, my opinion in this case is based upon that withdrawal of the concession. I think the enterprise as it stood originally, with the concession, was one thing, and the enterprise as it is now proposed to be continued, without the concession, is another, and a totally different thing. I think if you look to the object with which the bondholders advanced their money, what they had a right to expect and what they naturally did expect, namely, that the railway should be made as a part of a great system of navigation; that steamboats and necessary appliances should be put upon the River *Madeira;* that the profits of the *Navigation Company* working that traffic upon those rivers were to be pledged to them; and that everything was to be done which could open the new route from the trade centre of *Bolivia* to the *Atlantic;* if you look at those objects it is obvious enough that the withdrawal of this concession entirely altered the character of this enterprise or adventure.

But in order that I may point that out more specifically, I invite your Lordships' attention for a few moments to the details

of that concession:—[His Lordship stated them fully; the Government was to establish a port, was not to make changes in the import duties, and other advantages were to be secured; and the Government was to find labourers, who, however, were to be paid by the company.] If the Government of *Bolivia* had never made such a concession as this (which is the position in which things now stand, seeing that it has been withdrawn) it is open to the Government to levy any duty upon the goods which are brought into *Bolivia* by this new route, and to make such differences in those duties as to make it more desirable to pass the stream of commerce by the *Atlantic*. From first to last it must be borne in mind that the mainstay of the bondholders, as stated by the learned counsel for the Appellants, consisted in the restricted duties to be collected on this traffic.

Then, in case of issuing bonds, the respective coupons were to be receivable at the river custom-houses at their nominal value; there was to be an exclusive privilege of navigating the rivers, and if there was a trade springing up in this direction that would be a very valuable consideration in which the bondholders are deeply interested, because the bondholders are to have as one of their guaranties the net profits to arise from this navigation, which was to be an exclusive navigation; but if that concession is done away with the bondholders entirely lose that security. There were enumerated other matters of a like beneficial kind for the advantage of the bondholders:—[His Lordship read them in detail from the concession.]

I am afraid I have troubled your Lordships too long in detailing these provisions: at the same time they are very material, in my mind, as shewing what it is that the bondholders have lost. If you strike out all these powers and wipe out the concession as if it had never existed, you have before you not a railway as a link in a chain of communication, but an isolated railway between two points, valuable no doubt to the Government of *Brazil*, because it passes through Brazilian territory and would form the means of communication between the different points on that line, but perfectly useless as a means of establishing a route for commerce from *Bolivia* to the *Atlantic*, unless upon the supposition that the navigation of the River *Madeira* was also to be established. I do

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. Lord Penzance.

not say that it cannot be established in future, but I do say that that which was one of the great means the bondholders had for establishing it at the time when they contributed their money has passed away; that that has entirely altered the position of the bondholders, and that the trust which was created for the purpose of making this railway would not be executed by making the railway proposed under the *Collins'* contract without that concession.

It only remains for me to say one word upon that which was really very elaborately argued, namely, whether this was *res judicata*, whether it was a matter which the House could properly consider after what had taken place. The two suits which were relied upon were decided by the Master of the Rolls. One of them was decided in 1874. Upon that no doubt it is enough to say, without more, that it was decided in 1874, because the concession, which, to my mind, is the all important matter in this case, was not revoked until 1876. But the other suit was decided in November, 1876, and it was relied upon although that suit proceeded upon a totally different ground, and although in that suit the Plaintiffs did not complain that the railway could not be carried out, that it was impossible to carry out the original design, but only complained that the *Collins'* contract was a sort of trick, and would not carry out the original object of the trust, a suit in which the Plaintiffs asked, not that the money should be restored to them, but that it should be ordered that the trust should be carried out. It is very true that in a portion of their bill they said that, if it was impracticable, the money should be returned to them. Yet, as the Master of the Rolls said, the Court of Chancery has never sat to consider the effect of hypothetical applications of that sort. Therefore the suit was not a suit in any sense to the same effect as the present, but a suit asking that the trusts might be carried out. That suit was decided in November, 1876.

Now it is said, "True, the suit was of that character, but you might, seeing the concession was revoked in June, 1876, have intervened at the last moment and amended your proceeding, you might have brought forward the revocation of the concession, and made the very claim you are making to-day." I am hardly sufficiently versed in the practice of the Courts of Equity to know how

far such an application would have been entertained; it certainly would have altered the whole complexion of the suit and would have turned the suit upside down, I may say. I imagine had such an application been entertained at all, it would only have been upon the terms of the Plaintiffs paying all costs up to that time and beginning again upon a totally different footing. But after hearing what my noble and learned friend who preceded me, who is well versed in these matters, has said, I have no doubt that it was an application which nobody could be expected to make or would be bound to make, because the cause was set down for hearing and was heard in 1876. Therefore for the same reason on which the suit, decided in 1874 seems to me to be out of the question, the suit decided in 1876 seems to me to be equally out of the question. The Master of the Rolls never had the present question before him, and certainly never decided it.

Under these circumstances I am of opinion that the order should be altered in the mode suggested by my noble and learned friend on the woolsack.

LORD O'HAGAN:—

My Lords, in this case you have heard very lengthened and able arguments, referring to great masses of documentary evidence, and dealing with the statements of many witnesses; but it seems to me that when the true issue is understood it is very simple, both in law and fact. The law with reference to it is incontrovertible, and has not been disputed; and, in my view, the application of that law is neither difficult nor doubtful when the circumstances of the case are thoroughly understood. Into these circumstances, after the clear statement of them which has been already made, I do not propose to enter in detail. [His Lordship gave a sketch of them, and then said:—] I do not base my opinion on any imputation of fraud on any side.

I shall not occupy time by discussing the preliminary arguments which have been applied to bar the claim of the bondholders on the plea of *res judicata*; and the answer furnished by the delay alleged to have been consequent on their own litigation. I do not think either of those arguments tenable. The facts do not appear to sustain the latter, and as to the former, I am

H. L. (E.) 1880

NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

Lord O'Hagan.

content to refer to the lucid and satisfactory observations of Lord Justice *Cotton* (1) and of my noble and learned friend on the woolsack.

The true question is whether, as matters stand, the contract made with the shareholders has been broken in such a way, and to such an extent, as to entitle them to recover back the moneys which they paid on the faith of it? The prospectus proposed certain terms as the consideration for entering upon the enterprise: and, if the non-fulfilment of those terms has produced a failure of that consideration, on familiar and rudimental principles, the bondholders are entitled to the return of their advances. So far as there is evidence before your Lordships, all the bondholders, save one, appear to insist on the failure of tne consideration, and their consequent right to get back the advances; and I quite concur with the Judges of the Appellate Court that the objection on the part of a single bondholder, whether acting for himself or in the interest of the two companies, cannot deprive the others of the right with which such a failure would clothe them. [His Lordship went through the facts of the case with reference to the practicability of the construction of the projected works, in the course of doing which he referred to the provisions of the Bolivian concession, their non-observance, and the consequent revocation of the concession itself.]

The concession, which was an essential basis of the agreement, has been rescinded, and its rescission has destroyed the guarantie for the loan and made the complete execution of the project perfectly impossible. Of the rescission, I agree with all the Judges of the Court of Appeal, there is no ground for doubt.

It does not seem to me necessary to inquire whether the Republic was right or wrong in the rescission which it so made, deliberately and after long consideration. It assumed authority to rescind, and it used that authority. The concession is gone, and the people who gave their money in reliance on it have lost the security for which they bargained. They have lost it, through no fault of theirs, and they are wholly powerless to regain it. Even if the Republic was not justified in withdrawing it, they ought not to be the sufferers. But, so far as I can judge, the

(1) 13 Ch. D. at pp. 58, 59, 60.

Republic was right. The repeated breaches of contract, the great lapse of time, the character of the companies, which it was justified in declaring, by its minister, to be merely "imaginary;" the refusal of the reasonable guaranties required by the Bolivian law of November, 1874, and the want of means to prosecute the enterprise successfully; these things appear to have fully warranted this withdrawal of the concession. It appears to have been withdrawn reluctantly, when negotiations with the minister had proved abortive.

On this ground, therefore, I concur in the judgment of the Court of Appeal. The contract was integral. It regarded the navigation of the waters as well as the construction of the railway. They were two necessary parts of one and the same undertaking; and, failing one of them, that undertaking became abortive. The concession was of the essence of the consideration for the contract, and when it was withdrawn that contract was annulled. If the argument of the Appellants, as to the practicability of constructing the railway, and the possibility of raising money to complete it, had been more successful than, to me, at least, it appears, the result would have been the same. Even if the railway had been completed, the bondholders would not, in the absence of the concession, have got that for which they bargained, and they should not be held to a contract to which they never designed, and, indeed, had never been invited, to bind themselves.

I am of opinion that the judgment of the Court of Appeal, with the modification suggested by the Lord Chancellor, should be affirmed with costs.

LORD SELBORNE:—

My Lords, upon the evidence which has been brought before your Lordships, I assume the construction of the railway, by a company possessed of sufficient means, to be practicable, and likely to be beneficial for the purposes contemplated by the Bolivian and Brazilian Governments; and I am content to treat the constitution and present financial position of the Appellant companies, and the terms of the "*Collins*' Contract," merely as elements of the whole situation, which, if the bondholders and the Bolivian Government are, for any reasons, able to extricate themselves from their engage-

H. L. (E.) 1880 NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON. Lord Selborne.

ments with those companies, amply justify them in seeking to do so.

Without travelling into the details of the various instruments containing the tripartite contract between the *Navigation Company*, the Bolivian Government, and the bondholders, I may state their effect (so far as I consider it material) thus: It was of the essence of the contract with the bondholders that the interest on their bonds, and the principal (by annual drawings extended over twenty-five years), should be duly and punctually paid in every year. This was provided for during the first two years by the retention of a sufficient part of the loan itself, and after that time: first, by a pledge of the public faith and general revenues of the Bolivian Republic; and, secondly, by a security on the customs duties granted by the Bolivian concession to the *Navigation Company*, and on the profits of the companies; which last security, however, could only be available after the railway should be made and the navigation opened; and might then depend very much upon the monopoly of the navigation of Bolivian waters granted by the concession, and upon the power of the *Navigation Company* to develope it. The companies, having no paid-up or subscribed capital, had no other securities to give. The Bolivian Government, on the other hand, was not willing to come under any indefinite or unsecured liability to the bondholders. It was to that Government of great and manifest importance that there should not be an interval of uncertain (possibly prolonged and indefinite) duration after the end of the first two years, during which it might be called upon to pay the interest and instalments of principal due to the bondholders, without being indemnified by those other securities which could only become available on the completion of the railway. To prevent this, the companies came under an engagement to complete the railway by the end of the two years; and this was made a condition of the engagement of the Republic to pledge its faith, and the general revenues of *Bolivia*, for the payments due to the bondholders. For these purposes the following "declaration" was embodied in the Act of the Bolivian government by which the terms of the loan were ratified:—"Besides the security contained in Articles 2 and 7 of the principal contract, in conformity with Article 6 of the 'Bases for the Negotiation of a Loan'

of the 22nd day of December, 1869, there is hereby accepted, as a new guarantie, the contract entered into on the 18th of May, 1871, between the *National Bolivian Navigation Company* and the *Public Works Construction Company* of *London* to finish and complete the work of the railway of the rapids of the River *Madeira* not later than the first months of the year 1874." The ratification was granted expressly on the faith of that declaration; and it had the effect, in my judgment, as between the Republic and the *Navigation Company*, of making the completion of the railway by the time mentioned (which, according to the contract of the 18th of May, 1871, and the "detailed contract" of the 19th of January, 1872, made pursuant to it, would expire in April, 1874), or at least within a reasonable time afterwards, of the essence of the whole agreement.

The *Public Works Construction Company* was, as between the *Navigation Company* and the Republic, the mere servant and agent of the *Navigation Company*, for which that company was responsible. It was the business and the duty of the *Navigation Company* to make proper provision for the fulfilment of its own engagements; and when an engagement of that sort by its contractors was offered to, and accepted by, the Bolivian Government as a "security" and a "guarantie" for a very onerous liability undertaken by that Government upon the faith of it, I look upon it as equivalent to a direct engagement to the same effect by the *Navigation Company* itself. In estimating the true effect of dealings of this sort between an independent state and foreigners, substance and good faith, and not form and technicality, are (of course) to be regarded.

There has been a breach of both these essential parts of the contract; with the bondholders on the one hand, who have received no interest, or instalments of principal, since the end of the first two years, and have no prospect of receiving any as long as the present state of things shall continue, and with the Republic on the other; no part of the railway having been made, or so much even as commenced, within the two years, nor being likely to be afterwards made within any definite or reasonable limit of time. The former of these breaches of contract is, in my opinion, connected with, and substantially the consequence of, the latter; and both

H. L. (E.) 1880 ~ NATIONAL BOLIVIAN NAVIGATION COMPANY. v. WILSON. Lord Selborne.

have taken place without any fault whatever of the bondholders, or (as between itself and the *Navigation Company*) of the Republic.

I am of opinion that, under these circumstances, the Republic had substantial reasons for considering that it had a right after the end of the two years (unless some new arrangements were made between it and the *Navigation Company*), to give notice to the *Navigation Company* that it regarded and would treat the concession, and the contracts connected with it, as lapsed and forfeited, and would revoke them, if revocation were necessary. And this, in my opinion, the Republic actually did. It passed three Legislative Acts, in June and November, 1873, and in November, 1874; on the face of all which it appears to me clear that the stipulated time for completion is treated as of the essence of the contract; failing which (unless new arrangements were made) the engagements with the *Navigation Company* would come naturally to an end. The Republic appears to have been very desirous that the time should be prolonged or renewed, and the lapse or forfeiture of the concession, &c., waived, if satisfactory and substantial guaranties for the construction of the railway could be obtained. It authorized its executive government to send agents to *England* for that purpose; which was done. But the law of November, 1873, expressly (though in general terms) annulled all "arrangements" which might interfere with the objects then in view; and, in the event of the desired guaranties not being obtained, it authorized the Executive Government of *Bolivia* to "recall" the fund now in question from its destination under the existing contracts, clearly intending to treat those contracts as in that case terminated, though not (as I read the last two articles of that law) with any intention of arbitrarily setting aside the just rights of the bondholders. The law of November, 1874 suspended, with a view to farther negotiation, that of November, 1873; but it expressly declared that, failing the guaranties which it contemplated, the executive should "adhere to the law of the 5th November, 1873." It is unnecessary to go into the correspondence between the *Navigation Company* and the successive agents of the Bolivian Government under these several laws, whose authority to represent that Government by their acts and declarations I consider to be sufficiently established upon the evidence and by the adoption and

ratification of those acts and declarations by the Republic itself, as an actor in the Courts of this country down to the present time. It is enough to say, that the Bolivian agents insisted upon the lapse of time, and on the company's want of financial means to complete the enterprise; and that Colonel *Church*, on the part of the *Navigation Company*, avowed that the railway could not be completed within the time stipulated, and that it was practically impossible for the companies to raise any share or other capital for its completion; while he, at the same time, refused the guaranties and securities which the agents of the Government required, and denied that the Republic had any right to call for them. The final result was, that on the 27th of June, 1876, Señor *Quijarro*, the then diplomatic and financial agent and minister plenipotentiary of *Bolivia*, in *London*, by a letter of that date formally withdrew "all protection or aid on the part of *Bolivia* from the navigation and railway enterprises," and declared all the concessions given by the Government and Assembly of *Bolivia* to the *Navigation Company* "null and of no value." This position, as between the *Navigation Company* and the Republic, still continues unchanged. The effect, in my opinion, is, that the entire basis of the prospectus, trust deed, and security contract, on the faith of which the bondholders lent their money, has been destroyed by the action of the Bolivian Government, caused by the default of the *Navigation Company*. The consideration for the loan has failed, and the fund *in medio* ought (as the Court of Appeal has decided) to be restored to the bondholders.

It remains to consider three objections, which were urged at the Bar, to the bondholders' title to relief. The first was "*res judicata*":—the decrees of the Master of the Rolls, dated the 11th of December, 1874 and the 22nd of November, 1876, in two former suits, were said to stand in the way. I assume, for the purpose of the argument, that this objection ought to be dealt with as if every individual bondholder had been a party to each of those suits, and bound by those decrees. But the Republic of *Bolivia* was certainly not bound by them. No such case was made in either of those suits as that the contract, or the consideration for it, had failed by reason of any revocation or repudiation of the concession to the *Navigation Company* by the Republic of *Bolivia*.

H. L. (E.)
1880
NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.
Lord Selborne.

In point of fact, the final revocation or repudiation did not take place till the 27th of June, 1876, eighteen months after the former of those decrees, and seventeen months after the bill in the other suit was filed. The latter suit must have been set down for hearing before the 27th of June, 1876; and I am of opinion that, even if the bondholders who were Plaintiffs in the suit could have been permitted in so late a stage of it, to vary the substance of their case by amendment, and to introduce an entirely new state of circumstances, they were under no obligation to do so.

The second objection was, that the failure of consideration (if it has failed) has been caused by vexatious litigation on the part of the bondholders. But this (if the view which I take of the case upon the merits is correct) is disproved by the dates. The bondholders did not appear as Plaintiffs in the Court of Chancery till the 15th of January, 1874. It was at that time practically certain that the railway would not be made within the two years; and those two years finally ran out in the April following, through causes to which the bondholders had in no way contributed. That lapse of time, and the inability of the *Navigation Company* to give the Republic any satisfactory securities or guaranties (not any litigation or other conduct of the bondholders), produced the failure of consideration, upon which the conclusion at which I have arrived is founded.

The third objection was, that in point of fact the consideration has not in this way failed; because the Bolivian Government made an arrangement with the bondholders in September, 1877, the effect of which is said to be to preserve to them, in the event of the success of the *Navigation Company* in this suit, the most important of their original securities. The *Navigation Company* was not a party to that arrangement; it was certainly not intended to give the Appellants any rights as between them and the Republic, or as between them and the bondholders, which they would not otherwise have had; and it is difficult to see how they can be entitled to set up a mere *jus tertii* under such an arrangement as a reason why a decree, which the facts and law of the case would otherwise justify, should not be made. But the truth is, that the arrangement in question had nothing else in view than to guard against any possible injustice being done to

the bondholders in the event of the Courts of this country differing from the view of its own rights on which the Bolivian Government had acted, and refusing to release the bondholders' fund. To guard against such a contingency, the Republic transferred to the bondholders every sort of right which, in any view of the case, it might possess against the companies, and authorized them to take proceedings in its name, not to set the lapsed concession up again, but to effectuate, in all possible ways, its revocation. And lastly, if, notwithstanding all that could be done, the companies should prevail, and should eventually make the railway, the Bolivian Government agreed that the bondholders should in that case retain, not all their original securities, but all except the guarantie of the Republic, with its revenues. I have no hesitation in holding that if (the other facts being the same) that guarantie alone were withdrawn, the consideration would fail, and the bondholders would have a right to reclaim the fund now in question. It is unnecessary, therefore, to consider how far, or by what means, the bondholders would or might have been able, in the event supposed, to get the benefit of the securities which they were to retain; a point which seems to have been purposely left in obscurity.

With respect to the terms of the Lords Justices' decree I cannot assent to the argument that the Appellants are entitled to a lien on the fund in question for any expenditure which they may have made after notice of the revocation or repudiation by the Government of *Bolivia* on the 27th of June, 1876. But I am, on the other hand, not satisfied that the condition of giving up his bonds could properly be imposed on any bondholder not represented by the Plaintiffs, and I am prepared to agree with the variation, in that respect, of the terms of the decree which has been proposed by my noble and learned friend on the woolsack, unless the Respondents' counsel should desire to be heard against it.

LORD BLACKBURN:—

My Lords, the trust on which the moneys now in dispute are held was created by the prospectus on the faith of which the bondholders, or those whom they represent, lent their money.

H. L. (E.) 1880

NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

Lord Blackburn.

The material part of the prospectus is as follows:—[His Lordship read it, see *ante*, p. 182.]

Three fourths of the Customs dues were by the concession given to the *National Bolivian Navigation Company*, and formed a great part of what that company pledged as a security. The first drawing of the loan and the first three coupons were secured by money retained by the trustees, because that would cover the period fixed for the completion of the railway and works. And as the loan was all to be repaid in twenty-five years, and the Bolivian concession to the *Bolivian Navigation Company* was only for twenty-four years after it started its first steamboat, time was of great importance. If all had gone on, as, on the statements in the prospectus, was expected, the railway which was in the Brazilian territory would have been completed and equipped within two years, and then the bondholders would have had the security of the *Bolivian Navigation Company* (which included the railway and three-fourths of the Customs dues); and, if the estimate that the minimum net revenue was to be £356,200 was justified, that would be a very good security. I will assume, as till the contrary is proved I ought, that there was no fraud. But things did not turn out as expected. The railway and works have not been made to this day. There has been much litigation, into the details of which I do not enter. The Master of the Rolls, on the facts before him, came to the conclusion that the bondholders were entitled to have back their money. The judgment of the Master of the Rolls on the demurrer was not, and could not, have been successfully impugned.

The next question was, whether on the evidence the impossibility of completing the work was proved. Mr. Justice *Fry* thought it was not proved at all. The Court of Appeal unanimously thought that it was, both on the ground that it could not, in fact, be made, and on the ground that the Bolivian concession having come to an end it could not legally be made. The greater part of the long argument of the Appellants was directed to trying to prove that though it was admitted that not much more than half the railway could be made by the expenditure of the whole of the trust funds, yet that when that half was completed the *Navigation Company* would be able by aid from the Brazilian

Government, and from funds which from their improved credit they could then raise, to complete and equip the whole railway; or, at all events, that the Court was not justified in coming to the conclusion that they could not do so. On this I do not think it necessary to express any opinion. For assuming, for the purposes of the judgment, what I do not at all decide, that the railway could be completed, and even that when completed it would be such a success that the free profits would be a good security for the payment of an annuity for twenty-three years of £136,000 a year, that was not the security which was offered to the bondholders. They were offered in the prospectus the security of a company having a revenue calculated at £356,200 a year, of which £263,000 were wholly dependent on the Bolivian concession, and £93,000 on the navigation and railway, as part of one great scheme depending on the Bolivian and Brazilian concessions combined; and they have a right to object to the trust fund being applied to any other purpose than the completion of works which would form part o hat security. And I think it clearly proved that the Bolivian Government did revoke its concession. An objection made to the evidence by which that was proved, was I think founded on a mistake. Where an agent is clothed with ostensible authority no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known, to those who deal with the agent, to depend, on a written mandate, it may be necessary to produce, or account for the non-production of, that writing, in order to prove what was the scope of the agent's authority. In this case the scope of the authority given to Señor *Quijarro* depended, not on the private instructions given by the President, which therefore it was not necessary to produce or prove as part of the Plaintiffs' case, but on the fourth article of the decree of November, 1874, namely:— [His Lordship read it.]

I have had the opportunity of reading and considering the opinion of the noble and learned Lord opposite (Lord *Selborne*), and I quite agree with his reasons for holding that the Republic had a right to consider the concession at an end, and did do so, and that the various matters attempted to be set up in answer to

H. L. (E.) 1880

NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

Lord Blackburn.

the effect of this are not good. As I agree with those reasons I do not repeat them.

The objection taken to the form of the decree is not in this case a real one, as it is not conceivable that any bondholder would attach real value to his bonds after the trust fund is repaid. Still I do not think that anyone ought to be made to give up even a nominal right; and the variation in the decree proposed will obviate that objection. Such a variation should have no effect on the costs.

Mr. *Snagge*:—My Lords, I have the honour to appear with my learned friend Mr. *Macnaghten* on behalf of the trustees, Messrs. *Lloyd & Lambert*, who are also custodians of the fund. Perhaps it is right that I should mention the question of costs on their behalf, as it is proposed by your Lordships' judgment that the decree of the Court of Appeal should be varied. The trustees have from the beginning been merely passive parties to this litigation, and they have throughout submitted to act in accordance with the direction of the Court. What I have to ask your Lordships for is, that the order consequent upon your Lordships' judgment may declare not only that the trustees are entitled to costs as against the Appellants, but also that they may be entitled to pay themselves from the fund all costs, charges, and expenses, properly incurred by them in the discharge of their trust in the various stages of the litigation in this case.

THE LORD CHANCELLOR:—The alteration of the decree, or rather the mode in which the costs were proposed to be dealt with by the House, included this: "The trustees of the fund and the Respondents, who represent the bondholders, ought to have out of the fund any costs they may have incurred beyond what they will receive from the Appellants." Of course, that is costs as trustees —costs, charges, and expenses.

Mr. *Cozens-Hardy*:—Will your Lordships allow me to say, on behalf of the principal Respondents, that we have no objection to make the variation in the decree which your Lordship has suggested with reference to the bonds being deposited in the bank. With reference to the costs, I understand that your Lordships

propose that they should be dealt with as they were dealt with in the Court below. There taxation was directed in the first instance as between party and party, and those costs were ordered to be paid by the present Appellants. Taxation was also directed as between solicitor and client, and it was ordered that those solicitor and client costs of the bondholders should be paid out of the fund.

THE LORD CHANCELLOR:—The taxation would be a matter of detail. What the House proposes to do, is to give the person who represents the bondholders not only his costs in the first instance ordered to be paid by the Appellants as between party and party, but also any farther costs he may have incurred as trustee of the fund out of that fund.

Mr. *Cozens-Hardy*:—In the Court below the order was drawn up in this way: the solicitor and client costs were to come out of the fund, and such costs, if any, as we could recover from the Appellants we were to repay to the fund. We cannot disguise from ourselves that the chance of getting from the Appellants even those party and party costs which were ordered in the Court below, is very slight, and therefore we ask your Lordships to deal with the costs in the same way as they were dealt with in the Court of Appeal, that is to say, by directing that the solicitor and client costs should, in the first instance, come out of the fund.

THE LORD CHANCELLOR:—You mean that the order should take care that, if the Appellants make default in payment, you should not suffer by it.

Mr. *Cozens-Hardy*:—Yes.

THE LORD CHANCELLOR:—That is right.

The following order was afterwards entered on the Journals:—

It is *Ordered* and *Adjudged*, That paragraph 8 of the judgment of Her Majesty's Court of Appeal, of the 20th of June, 1879, be varied so that it shall run as follows: "And it is

H. L. (E.)
1880
NATIONAL BOLIVIAN NAVIGATION COMPANY v. WILSON.

Ordered, That the said Defendants, *Alfred James Lambert* and *John Horatio Lloyd*, do indorse upon each such bond the name of this cause, and the date of this decree, and the amount paid on such bond, and the date of payment, and the name of the person to whom the payment shall be made, and do retain the coupons attached or belonging thereto, and also (with the consent of the bondholder, but not otherwise) the bond itself, and deposit the said coupons, and also such bonds as shall be retained by them with such consent as aforesaid, in the *Bank of England* in the names of Messrs. *Lumb, Wanklyn, & Co.*, and the Bolivian Government." And it is farther *Ordered* and *Adjudged*, That the said judgment, complained of in the said appeal, subject to the above-mentioned variation, be, and the same is hereby affirmed; and that the Appellants do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the said costs to be taxed as between party and party, and the amount thereof to be certified by the clerk of the Parliaments: And it is farther *Ordered*, That the said costs, or such portion thereof as may be received from the Appellants by any of the said Respondents, other than the Respondents the Republic of *Bolivia*, be paid by the parties receiving the same to the said Respondents, *John Horatio Lloyd* and *Alfred James Lambert*, who are to add the amount so paid to them to the said trust fund: And, in addition thereto, it is *Ordered*, That any costs, charges, and expenses properly incurred by the said Respondents, *John Horatio Lloyd* and *Alfred James Lambert*, as trustees of the said trust fund, whether such costs are or are not costs of this appeal, and any costs, charges, and

expenses of the said *William Millar Wilson* representing the bondholders, including therein any costs, charges, and expenses properly incurred, charged, or authorized by the said *William Millar Wilson* or the committee of bondholders in recovering, securing, and protecting the said trust fund for the bondholders, notwithstanding such costs, charges, and expenses are not costs of this appeal, be also taxed as between solicitor and client, and the amount thereof certified by the Clerk of the Parliaments: And it is farther *Ordered*, That the said Respondents, *John Horatio Lloyd* and *Alfred James Lambert*, do out of the said trust fund pay and retain the amount of their said costs, charges, and expenses, and do thereout also pay to the said *William Millar Wilson* his said costs, charges, and expenses, when so respectively taxed as aforesaid: And it is also farther *Ordered*, That the cause be and the same is hereby remitted back to the Chancery Division of the High Court of Justice, to do therein as shall be just and consistent with this variation and judgment.

Lords' Journals, 23rd March, 1880.

Solicitors for Appellants: *W. W. Wynne; G. M. Clements.*

Solicitors for Respondents: *Wilson, Bristows, & Carpmael; Cunliffe, Beaumont, & Davenport.*

[HOUSE OF LORDS.]

H. L. (E.) FREDERIC GUILDER JULIUS . . . . APPELLANT;

1880

AND

March 4, 8, 9, 11, 15, 16, 23. THE RIGHT REV. THE LORD BISHOP OF OXFORD; THE REV. THOMAS THELLUSSON CARTER . . . . . } RESPONDENTS.

Church Discipline Act—Discretionary Power of Bishop—"It shall be lawful."

19 Ch D. 313, 314, 316, 22 Ch D 41

The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.

But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it.

The 3rd section of the *Church Discipline Act* (3 & 4 Vict. c. 86), provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report:—

Held, that this section gave the bishop complete discretion to issue or decline to issue such commission.

The Act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions therefore may be construed independently of the practice under the previously existing law.

Per LORD BLACKBURN:—There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application, which in this case he has performed.

Enabling words are always compulsory where they are words to effectuate a legal right.

Reg. v. *The Tithe Commissioners* (1) and *Ditcher* v. *Denison* (2) commented on, and explained.

THIS was an appeal against a decision of the Court of Appeal which had reversed a previous decision of the Queen's Bench Division.

The Appellant was a parishioner of the parish of *Clewer*, in the

(1) 14 Q. B. 459–474. (2) 4 Q. B. D. at p. 273.

county of *Berks*, of which the Rev. Mr. *Carter* was the rector. The Appellant thought that Mr. *Carter* practised, in his own person, and permitted his curate to practise, certain ritualistic observances in the performance of Divine Service forbidden by the law of the Church of *England*, and in due form presented to the Bishop of *Oxford*, in whose diocese *Clewer* was situated, a letter of complaint dated the 11th of July, 1878, as to these ecclesiastical offences, and applied to have a commission issued by the bishop for the purpose of making inquiry into the grounds of the charges, according to the provisions of the statute 3 & 4 Vict. c. 86, or to have the case sent in the first instance by letters of request to the Court of Appeal of the province to be there heard and determined (1). After some correspondence on the subject the bishop refused the application, saying in a letter dated the 10th of August, 1878, "The repeated occurrence of failures, during the last few years, in the conduct of legal proceedings of this kind, has had a tendency to cover all persons concerned in them with ridicule, and to bring the Church itself into some contempt, which I would not willingly increase. In this case I have farther to consider that the complaint is made in opposition to the strongly expressed wish of the great majority of the parishioners, and that the person complained of is a clergyman in advanced years, generally respected, and even beloved by those who know him."

On the 23rd of January, 1879, a rule was obtained in the

(1) 3 & 4 Vict. c. 86, s. 1: "Whereas the manner of proceeding in causes for the correction of clerks requires amendment."

Sect. 3: "In every case of any clerk in holy orders of the United Church of *England* and *Ireland* who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission to five persons of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report."

Sect. 13 enacted that "it shall be lawful for the bishop of any diocese within which," &c., "if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings" to send the case by letters of request to the Court of Appeal of the province.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD.

Queen's Bench Division calling on the bishop to shew cause why a mandamus should not be issued commanding the bishop to issue a commission, or to send to the Court of Appeal for the province letters of request under the provisions of the 3 & 4 Vict. c. 86. The bishop shewed cause in person against this rule, which however was, on Saturday, the 8th of May, 1879, made absolute (1). The case was taken to the Court of Appeal where it was, on the judgments of Lords Justices *Bramwell*, *Baggallay*, and *Thesiger*, reversed (2). This appeal was then brought (3).

Mr. *Herschell*, Q.C., and Mr. *Jeune* (Mr. *Chalmers* was with them), for the Appellant :—

The question to be determined here is the construction to be put on the 3rd section of the *Church Discipline Act*, 3 & 4 Vict. c. 86. Does that section vest in the bishop an absolute and uncontrolled discretion to grant, or refuse, the exercise of his powers, when a clear case is stated for their exercise, when the complainant is a fit person to make the complaint, and is able and willing to fulfil the conditions under which such complaint is to be presented? It is impossible to conceive that the Legislature should have created a power to put in motion the provisions of a statute intended to preserve the discipline of the Church, should have conferred that power upon the great dignitaries of the Church to enable them to enforce the law for the benefit of the Church, and yet have left to each of these dignitaries an absolute discretion to render the provisions of the law inoperative, so that individual discretion might lead to the exhibition of total disregard of uniformity in the administration of Ecclesiastical Law. Such has certainly not been the principle of the law in any similar matter. The words in the statute, "it shall be lawful" have not, and never could have been intended to permit such a result. They are words which declare the possession of power, of which the rules and the principles of law require the exercise. In numerous instances

(1) 4 Q. B. D. 245.

(2) Ibid. 525.

(3) Questions arising upon the old law were discussed in the Courts below, and are fully reported. These questions were introduced into the argument here, and the authorities quoted upon the occasions of the former discussions were again cited, but the judgments of their Lordships being confined to the construction of the statute, these arguments are not repeated.

those expressions, and the simple word "may" (which in itself does appear to be wholly and almost exclusively permissive) have received from the Courts the meaning of being directory. Whenever a public duty is to be performed they must have that meaning.

The old law on this subject did not allow the existence of such a discretion as that which is now contended for. It was obligatory on the bishop to allow his office to be promoted if a proper complaint was made, and made in due form and by a proper person. There are numerous instances which shew that the promotion of the office of Judge was allowed as a matter of course, and the *Church Discipline Act* contains no express declaration of the intention of the Legislature that what had been before done, should in future be wholly disregarded. The power of the bishop was derived from the Crown, and like other powers derived from the Crown and intended to be exercised for public benefit, it was required to be executed whenever a fitting occasion arose. Such powers were never intended to be rendered inoperative at the caprice of any individual. No discretion of that kind was allowed to Courts of Law, many of which possessed powers conferred, as to particular matters, by such expressions as "it shall be lawful," and "may;" but the Courts had always acknowledged themselves to be authoritatively bound by these words whenever the occasion described in the statute conferring the powers, called for their exercise. That the words "it shall be lawful" imposed a duty on the bishop was shewn by reference to the next portion of the sentence, which distinguished between what he was required to do on an application properly made, and what he might do if he chose to act of his own accord without any application. In the latter case the words were "or if he shall think fit of his own mere motion." There the words did appear to leave him at liberty to exercise his discretion, and if he did not think fit to institute proceedings on his own accord, he might refrain from doing so. But when a complaint was made to him, he was bound to put the law in motion. The distinction between the two cases was plain, and it had been clearly and strongly pointed out by Dr. *Lushington*, who, when sitting as the assessor to the Archbishop of *Canterbury* in the case of *Ditcher* v. *Denison* (1), said, "It is perfectly clear that

(1) See 4 Q. B. D. at p. 273.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD.

if a bishop, under this statute, thinks fit, he has a discretion, which he is entitled to exercise, whether he will himself, of his own mere motion, direct proceedings to be commenced. It is not so with reference to an application made to the bishop, and for various reasons. If it were so the ancient law of the Church would have been subverted by this statute, which there was no intention to do," and that very learned Judge went on to shew what great evils to the Church would be the consequence of the exercise of a discretion permitted to be so doubtful and capricious in its exercise. As to statutes conferring, by such words, powers on the Courts of Law, the course of the decisions had been uniformly in accordance with the principle that permissive words in the creation of a power which was created for public purposes, must be construed as directory. In the *Case of Alderman Backwell* (1) "the Lord Keeper declared that though the words in the Act of Parliament were that the Chancellor *may* grant a commission of bankrupt, yet that *may* was, in effect, *must*, and it had been so resolved by all the Judges." That case had always since been followed. So words of this kind, merely permissive in form, had been held obligatory upon churchwardens to make a rate: *Rex* v. *Barlow* (2). And they have been held obligatory upon the Superior Courts to enforce the payment of costs where there was a concurrent jurisdiction with the County Courts, though the words used in the statute were merely that, in the circumstances stated, the Court *may* direct that the Plaintiff shall recover his costs: *Macdougall* v. *Paterson* (3). There Lord Chief Justice *Jervis* said: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." *Crake* v. *Powell* (4) is exactly to the same effect. In *Morisse* v. *The Royal British Bank* (5) a similar rule was applied to the construction of the words "it shall be lawful." And the principle plainly is that, where there is any public interest or right involved, the words must receive a construction of obligation and not of

(1) 1 Vern. 152.
(2) 2 Salk. 609; see *Bowes* v. *The Hope, &c. Co.* 11 H. L. Cas. 389.
(3) 11 C. B. 755; 21 L. J. (C.P.) 27.
(4) 2 El. & Bl. 210.
(5) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.

discretion. *Rex* v. *Havering-atte-Bower* (1) was to the same effect. The rule was expressed by Mr. Justice *Coleridge* in *Reg.* v. *The Tithe Commissioners* (2). In delivering the judgment of the Court, he said (3): "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that, in public statutes words only directory, promissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit, or in advancement of public justice." These words exactly described the present case, where a capricious refusal to institute an inquiry under the statute prevented a public benefit, and interfered with the administration of public justice. It was not denied that, in this instance, an ecclesiastical offence had in fact been committed, and this refusal to grant a commission or to send the case under letters of request, left the law of the Church without its proper vindication.

Mr. *A. Charles*, Q.C., and Dr. *W. Phillimore* (Mr. *Montagu Muir Mackenzie* was with them), for the Respondents:—

By the old law the proceedings were not, as it was now asserted, instituted as a matter of right; they were often granted, but not *ex debito justitiæ*. The very restrictions as to the individual who wished to institute them, and the requirement that he should be of ability to pay costs, established that, as the words used by Sir *J. Nicholl* in *Carr* v. *Marsh* (4) distinctly proved. But the old law was now superseded by the existing statute, as the Lord Chief Justice of the Queen's Bench had himself stated (5), and this statute had clearly placed the institution of such proceedings within the discretion of the bishop. It was necessary that that should be done for the peace of the Church, and the quiet of individuals who might otherwise be, in many cases, subjected to needless and vexatious persecution. The necessity of shewing interest in the party who desired to institute proceedings was now removed, the power to apply to the bishop was given to *any* person, and, as a counterpoise, the bishop was declared to possess a discretion in permitting the proceedings to be instituted. The

(1) 5 B. & Ald. 691.
(2) 14 Q. B. 459.
(3) 14 Q. B. at p. 474.
(4) 2 Phillim. 198, at p. 204.
(5) 4 Q. B. D. at p. 251.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD.

words "it shall be lawful" conferred on him a power; but there was nothing in the statute to shew that, whatever the circumstances of the case might be, he was bound to put that power into active operation. The cases in which permissive words of the sort employed in this statute had been treated as compulsory, were those where a clear legal right existed in the person demanding the exercise of the power, and where that right would be wholly defeated if the power was not exercised. Here no such right existed, and no such result could follow. That was the complete and decisive answer to all the cases which had been relied on by the other side. But there were, on the other hand, many cases in which, where no legal right did exist and required to be enforced, powers were conferred which never might be put in force by the persons on whom they were conferred, and though they were conferred avowedly for the public benefit, the putting of such powers in force was left to the discretion of those who possessed them. Thus, where an Act recited that the making of a railway would be beneficial to the public, and, upon that very ground, conferred on the railway company certain powers compulsorily to take land for that purpose, it was held that there was no duty imposed on the company to make the railway, and a rule for a mandamus to compel the company to make it was discharged: *York and North Midland Railway Company* v. *The Queen* (1). And in a case in which power was given to the justices to make an order for the payment of a salary to an officer of the corporation it was held that, though several statutes gave the borough justices power to control the jail and pay the salary of the governor, the town council had still a discretion which might be exercised as to its amount, and could not be compelled by mandamus to pay the amount fixed by the justices: *Reg.* v. *The Mayor, &c., of York* (2). Again, in *In re Bridgman* (3), it was held that the words in the 12 & 13 Vict. c. 106, s. 130, "it shall be lawful" for the Lord Chancellor to remove a trustee who had been a bankrupt did not compel his removal, but that the Court had a discretion with respect to the circumstances of the application. In *Reg.* v. *The Bishop of Chichester* (4) the Court of Queen's Bench held, on

(1) 1 El. & Bl. 858.
(2) Ibid. 588.
(3) 1 Dr. & Sm. 164; 29 L. J. (Ch.) 844.
(4) 2 El. & El. 209.

this very statute, that the bishop was invested with a discretion. And in *Re Newport Bridge* (1) a similar construction was put upon "it shall be lawful" in an Act relating to the repair and improvement of a county bridge, though there could be no doubt that that was a matter of public concern. There never had been such a rigid rule of construction as was contended for on the other side. The natural meaning of the words had always been given to them, and that was the permissive meaning only, unless the nature of the matter which was the subject of enactment, and the necessity of exercising the power in order to effectuate established legal rights, required a different course to be pursued. Here there was no established legal right to be enforced, and the peace and good discipline of the Church were better secured by leaving the exercise of the powers conferred by the statute to the discretion of those who possessed them.

Mr. *Chalmers* was (in the absence of his leaders) allowed to reply, but it was expressly stated that this was in no way to be considered as anything but a special favour, and in no respect to be treated as a precedent.

THE LORD CHANCELLOR (Earl *Cairns*):—

My Lords, in this case Dr. *Frederick Guilder Julius*, of *Clewer*, in the county of *Berks*, preferred a complaint to the Bishop of *Oxford* against the Rev. *Thomas Thellusson Carter*, rector of the parish, in respect of unauthorized deviations from the ritual of the Church in the Communion Service, and the use of unauthorized vestments, and required the bishop to issue a commission under the *Church Discipline Act* (3 & 4 Vict. c. 86), to inquire into this charge. This commission the bishop, in the exercise of his discretion, declined to issue. The Court of Queen's Bench, on the application of Dr. *Julius*, directed a writ of mandamus to issue commanding the bishop either to issue the commission which Dr. *Julius* had applied for, or to send the case by letters of request to the Court of Appeal of the province under the statute.

The question is, was the Court of Queen's Bench right in awarding this mandamus? The Court of Appeal has reversed the

(1) 2 El. & El. 377.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Earl Cairns, L.C.

decision of the Court of Queen's Bench. The Court of Queen's Bench in awarding the mandamus, and the Court of Appeal in reversing this decision, were both unanimous, and it is for your Lordships now to decide between them.

The case appears to me to turn upon the use of the words "it shall be lawful" in the 3rd section of the *Church Discipline Act*. I cannot think that the practice of the Ecclesiastical Courts, before the Act, need be the subject of much examination. The Act states in the preamble that "the manner of proceeding in cases for the correction of clerks requires amendment." Whether, therefore, the office of the judge could, before the Act, be promoted by any person as of right, or whether a discretion could be exercised by the Judge as to allowing himself to be put in motion, or as to the terms on which he could be put in motion, is not, as it seems to me, of much importance, inasmuch as the practice in this respect may have been just one of the matters which the Act was intended to amend.

The 3rd section of the Act enacts,—omitting words which for the present purpose are immaterial,—that in every case of any clerk who may be charged with any offence against the Laws Ecclesiastical it shall be lawful for the bishop of the diocese within which the offence is alleged to have been committed, on the application of any party complaining thereof, to issue a commission for the purpose of making inquiry as to the grounds of such charge. And the question is, under the words "it shall be lawful" is the bishop bound, on the application of any party, to issue a commission, or has he a discretion as to whether he will issue it or not?

The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words "it shall be lawful" might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in

the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.

I think that if these principles are kept in mind it will be found that all the cases on this subject are easily understood and reconciled, and I will refer shortly to the most important of those which were mentioned to your Lordships before examining farther the circumstances connected with the present case.

The earliest case which is generally referred to is that of Alderman *Backwell* (1) before Lord Keeper *North*. The creditors of Alderman *Backwell* petitioned for a commission of bankruptcy against him, and they would have been obviously exposed to prejudice and hazard, if it had not been granted. The words of the statute were that the Chancellor "may grant a commission," and the Lord Keeper held that he was bound to exercise the power which was in effect reposed in him for the benefit of those who asked for its exercise.

The next case is the *King* v. *Barlow* (2). That was not a mandamus but an indictment on the 14 Car. 2, c. 12, against the churchwardens for not making a rate to reimburse the constables. The statute appears to have used the words "may make a rate," but it was naturally held that the constables were entitled to be reimbursed, and that the churchwardens, being made the depositaries of a power for that purpose, could not refuse to exercise it.

(1) 1 Vern. 152. (2) Salk. 609.

H. L. (E.)
1880
JULIUS
v.
LORD BISHOP OF OXFORD.
Earl Cairns, L.C.

The *King* v. *Havering-atte-Bower* (1) was the case of a mandamus in reference to a power granted by royal charter to the steward and suitors of a manor giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a Court for the public benefit, and that the stewards and suitors of the manor were bound to hold the Court.

In *Macdougall* v. *Paterson* (2) the question was whether the Plaintiff in a County Court action who had recovered his debt should not have his costs taxed and allowed in a particular way. The statute had provided there, that under the circumstances in which the Plaintiff stood, the Court might by rule or order direct that he might recover his costs; and Chief Justice *Jervis*, delivering the opinion of the Court, stated that the conclusion to be drawn from the cases was that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority, when the case arises, and its exercise is duly applied for by a party interested, and having the right (that is having by statute the right) to make the application.

The case of *Morisse* v. *Royal British Bank* (3) was a case of the same kind, and decided that under the words "it shall be lawful for the Court," a creditor who had obtained judgment against a joint stock banking company, and had failed to recover his debt against the company, was entitled as of right to execution against a shareholder, on complying with the conditions imposed by the statute.

My Lords, the only other case that I will refer to is one which was decided in the Court of Queen's Bench in 1849, *Reg.* v. *Tithe Commissioners* (4). A power was there given to the Tithe Commissioners in dealing with certain landowners, to confirm agreements for commutation of tithe under certain special circumstances and conditions, which I need not refer to at length. The Court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the Commissioners were bound to confirm the agreements there mentioned.

(1) 5 B. & A. 691.
(2) 11 C. B. 755; 21 L. J. (C. P.) 27.
(3) 1 C. B. (N.S.) 67; 26 L. J. (C. P.) 62.
(4) 14 Q. B. 459.

In delivering the opinion of the Court, Mr. Justice *Coleridge* uses these words: "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." To the rule thus guardedly expressed there is not, perhaps, much to object, and I only refer to the words for the purpose of pointing out that I am unable to see that they justify the expressions of the Lord Chief Justice of the Queen's Bench in the present case, who speaks of them thus (1): "Now finding nothing in the enactments or language of the 3rd section or other parts of the *Church Discipline Act*, which should have the effect of controlling or qualifying the words 'it shall be lawful,' but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction has assigned to them, a canon of construction so thoroughly settled, that Mr. Justice *Coleridge* speaks of it as an axiom,—and by which, in construing this statute, we deem ourselves absolutely bound." The only axiom Mr. Justice *Coleridge* spoke of was, that, under certain circumstances, enabling words might have a compulsory force.

My Lords, the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

I now turn to the *Church Discipline Act*, for the purpose of considering whether it is possible to suppose that an absolute and unconditional right was given by it to put in motion the bishop of the diocese, independently of any judgment or discretion of his own.

The 3rd section provides [His Lordship read it, see *ante*, p. 215.]

The first observation which occurs upon this section is, that the

(1) 4 Q. B. D. at p. 272.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Earl Cairns, L.C.

words "any party" are words of the most general kind, and must, as was admitted in the argument of the Appellant, extend to any natural-born subject of the Queen. The Appellant, who, in the case before your Lordships, invokes the action of the bishop, is a parishioner of the parish of *Clewer*, and a member of the Church of *England*; but if he is right in his construction of the statute, the aid of the bishop might be invoked equally by one who never had entered the parish, who never had been in *England*, who was ignorant, perhaps, of the language, who was not a member of the Church of *England*, who was not, possibly, a believer in Christianity. If, under the statute, any person has an absolute right to put the bishop in motion, a person may do so who is a pauper, or wholly unable to answer the costs of the suit. No authority is given to the bishop to require security for costs, and the clerk may be ruined by a litigation from which he emerges as the victor.

Again, the offence charged may be an offence against the Laws Ecclesiastical, but it may be of so trifling and insignificant a nature that no one, having any discretion in the matter, ought to allow it to be the subject of litigation. Or the charge or the report may be one which, within the knowledge of the bishop, is unfounded. Or, again, the clerk may have been chargeable with a departure from authorized ritual, and on the remonstrance of the bishop may have admitted his fault and have promised to discontinue the wrong practice, and may have faithfully kept such promise, and yet, an offence having once been actually committed, the bishop, if the argument of the Appellant be right, may be called upon to proceed against the clerk, with whose conduct in the matter he has every reason to be satisfied.

The illustrations of the effect of the Appellant's argument which I have suggested (and many more might be added) appear to have been felt by the Queen's Bench to press against the argument. In some of the cases which I have suggested the difficulty is met by the Court of Queen's Bench, by saying that if the bishop refused to act the Court might, in its discretion, refuse to grant a mandamus to make him act. But this is only saying that the Court will take upon itself to exercise a discretion which it refused to allow to the bishop.

It is farther to be observed on this part of the case that the

bishop of the diocese cannot, in my opinion, be looked upon merely as a ministerial officer through whose hands process is to pass as a matter of form. He is charged with the oversight of his diocese, and with a vigilant attention to its discipline; and if discretion as to proceedings, in respect of the discipline of clerks, is to be reposed anywhere, it is in the bishop that you would expect to find it. But, in truth, a most conspicuous instance of the reposing of this discretion in the bishop is found in another part of this statute. The 3rd section allows the bishop of a diocese in which an act of immorality has been committed by a clerk, having preferment in another diocese, to issue a commission to inquire into the grounds for a formal charge. I will suppose that the bishop of diocese *A.* issues such a commission of his own authority against *X.*, a beneficed clergyman of diocese *B.* The commissioners report that there are *primâ facie* grounds for proceeding against the party accused. The bishop of diocese *A.* is thereupon, under sect. 5, to transmit a copy of this report and of the depositions to the bishop of diocese *B.;* thereupon, under sect. 7, the bishop of diocese *B.* may proceed in due form of ecclesiastical law against *X.* up to punishment; but it is quite clear, under the 7th section, that it is discretionary with the bishop of diocese *B.* whether he will do this or whether he will allow the whole proceedings, even after the commissioners have found that there is a *primâ facie* case, to drop.

My Lords, if the statute had singled out particular individuals who might naturally be supposed to have a personal interest—the churchwardens, for example, or even certain communicants or parishioners—and had laid down conditions as to costs, or otherwise, which they were to comply with before calling on the bishop to take proceedings, there might have been a ground for contending, on the authorities I have referred to, that the power of the bishop was one which under those circumstances he could not refuse to exercise. This, however, is not the frame or character of the enactment; and, indeed, having regard to the various matters to which the Act applies and the various dioceses in which it might have to be put in force, it is difficult to see how the enactments could have taken that shape.

I ought to mention an argument which was much dwelt upon

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Earl Cairns, L.C.

before your Lordships and in the Courts below, viz., the argument that the words "if he shall think fit," in the 3rd section, in the alternative power to the bishop to proceed of his own mere motion, rather imply that on the application of a third party he is to proceed whether he thinks fit or not. My Lords, I do not think that the words "if he shall think fit" have any such effect. They appear to me to be, where they occur, mere surplusage, as, indeed, is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words in fact appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without any one to put him in motion, if he chooses to do so.

My Lords, I am satisfied upon these short grounds, and without going into many of the topics which were so elaborately considered in the Courts below, that the judgment under appeal is correct and ought to be affirmed. I will only add that if I am right in holding that the bishop has, under the statute, a discretion as to proceeding or not proceeding, in the way in which the Appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible, and it would, in my opinion, be inconsistent to hold that his discretion is an answer to the application for a mandamus, and at the same time, on that application, to criticise the grounds upon which that discretion has been exercised.

I have only to move that the appeal should be dismissed in the usual way.

LORD PENZANCE:—

My Lords, the considerations upon which the decision of this case should be based are, in my judgment, much more limited than those which have been advanced in argument.

The state of the law before the *Church Discipline Act* passed, though not perhaps wholly immaterial, can go for very little in

the interpretation of that Act, when it is borne in mind that the preamble declares that "the manner of proceeding in causes for the correction of clerks requires amendment." In the face of such a preamble, it would be difficult to contend that any particular change in the "manner of proceeding" could not have been intended, and the change actually made whereby the bishop is substituted for the Judge, renders the practice which existed at the time when the whole proceeding was in the hands of the Judge, a matter of very slender and remote consideration.

If it were otherwise, I should not hesitate to say that, in my opinion, the Judge always had a right and power to refuse to permit his office to be promoted if he thought fit; and that the statements of the law on this subject by Lord *Stowell* and Sir *George Nicoll*, far outweigh the language attributed to Dr. *Lushington* in the single case of *Ditcher* v. *Denison* (1). Nor do I think the question raised in the present proceeding has been, in any binding sense, concluded by previous authority. There are numerous dicta on the interpretation of the clause in the *Church Discipline Act* which is now in controversy; but there has been one decision, and one only, which proceeded upon the proper effect to be given to that clause. I allude to the *Bishop of Chichester's Case*, in which Mr. Justice *Wightman*, with, I think, probably the approval of Lord *Campbell*, decided the case, and acted upon the principle which the Court of Appeal in the present case has affirmed.

The contention of the Appellants, therefore, is one which I think may and ought to be considered by your Lordships on its merits; and I proceed to consider what those merits are.

In the outset I entirely agree with what has fallen from the Lord Chancellor as to the proper and legitimate way of stating the question here involved. The words "it shall be lawful" are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of

(1) 4 Q. B. D. at p. 273.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Penzance.

persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it.

This, in my judgment, is the true question; and I confess that I hardly think that it receives a satisfactory solution from the somewhat loose definition attributed to Mr. Justice *Coleridge* in the case of *Reg.* v. *The Tithe Commissioners* (1), which has been referred to as a binding statement of the law upon this subject. It is surely not enough that the thing empowered to be done should be for the public benefit, in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general public Acts, are for the public benefit, or they would not have been conferred. But had the words been more precise, they would hardly justify the use that has been made of them; for what Mr. Justice *Coleridge* said was, not that permissory or enabling words are to be held to "have a compulsory force where the thing to be done is for the public benefit," &c., but only that such words "may," in some cases, have that effect. If the matter were to be decided by previous definitions, I should prefer that of the Lord Chief Justice *Jervis*, who said, in the case of *Reg.* v. *York and North Midland Railway* (2), that such words as "it shall be lawful" were to be understood as permissive only, unless some "absurdity or injustice" would follow from giving them that, their natural meaning. Neither, however, of these definitions goes so far as that which is to be found in the judgment of the Lord Chief Justice in the present case. He said, "It is an established canon of construction that in statutes of a certain class such words as 'it shall be lawful' have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or by what, on the purview of the statute, is its apparent purpose." That is to say, these words, in a certain class of statutes, import *primâ facie* not permission, but obligation; and must be so construed unless the conclusion that they were so intended can be displaced. No specific authority is cited for this proposition, nor have I been able to find any.

(1) 14 Q. B. at p. 474. (2) 1 El. & Bl. at p. 861.

Passing, therefore, from definitions which are apt not to be uniform, and which are with difficulty so framed as to be applicable to all cases, I think it far more satisfactory that your Lordships should look at what the Courts in previous cases have done rather than what the learned Judges may have said, and I invite your Lordships' attention to the cases cited in argument, where the Courts have actually held that the power conferred, though by permissive words only, was one which the individual was bound to exercise, and to compare those cases with the case now under consideration.

In *Backwell's Case* (1), the power conferred was that of issuing a commission of bankrupt, and it was conferred on the Lord Chancellor. In *Rex* v. *Barlow* (2) power was conferred on certain persons to raise a rate to reimburse a constable for expenses lawfully incurred. In *Rex* v. *Steward of Havering-atte-Bower* (3) power was conferred to hold a Court for recovery of debts in a manor; the power had been exercised, but had for fifty years been disused, the exercise of it by holding the Court was enforced by mandamus, on the application of one entitled to sue in it. In *Macdougall* v. *Paterson* (4) and *Crake* v. *Powell* (5) the Superior Courts were empowered to direct that a person entitled to costs should recover them. In the case of *Reg.* v. *Tithe Commissioners* (6), in which the expressions above quoted of Mr. Justice *Coleridge* are to be found, power was conferred on the Tithe Commissioners to confirm agreements with respect to tithes not legally binding, when it appeared to them that such agreements gave a fair equivalent for the tithe. In *Morisse* v. *The British Bank* (7) power was conferred upon the Courts to grant execution against a shareholder creditor who had obtained judgment against the company and issued execution against it without effect.

In all these instances the Courts decided that the power conferred was one which was intended by the Legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty.

(1) 1 Vern. 152.
(2) 2 Salk. 609.
(3) 5 B. & Ald. 691.
(4) 11 C. B. 755; 21 L. J. (C. P.) 27.
(5) 2 El. & Bl. 210.
(6) 14 Q. B. 459.
(7) 1 C. B. (N.S.) 67; 26 L. J. (C. P.) 62.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Penzance.

In other words, the conclusion arrived at by the Courts in these cases was this—that regard being had to the subject-matter—to the position and character of the person empowered—to the general objects of the statute—and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended. Thus the right of a creditor to have his debtor made a bankrupt, though the person empowered to issue the commission was the Lord Chancellor, and therefore a person in whom a discretion (if the subject had admitted of one) might well have been reposed, was held to be one that justice required should be exercised without discretion. The right of the constable to be re-imbursed his expenses stood on the same footing. The same may be said of the right of the suitor to have his case heard in the Manor Court. When once it was plain that a Plaintiff had a right to his costs, it could not be intended that the Legislature had conferred a discretion on the Courts whether they would enable him to get them or not; and the same reason applies to a creditor's remedy against the member of a company which was indebted to him. If the idea of a discretion had not been excluded in these cases by the requirements of justice, and other general considerations, the Courts could not have held that to be compulsory which the Legislature had described, in terms, enabling and permissive only.

The question then arises whether in the present case there are any considerations sufficiently cogent to exclude the idea that the Legislature intended a discretion. If we look at the subject-matter to which the enactment in question relates, we find that it involves nothing less than the entire discipline of the clergy, and the enforcement of all ecclesiastical punishments and penalties. Did the Legislature intend then that ecclesiastical offences should be a matter for wholesale and indiscriminate prosecution, without regard to their nature, the circumstances under which they may have been committed, the conduct by which they may have been atoned, or the guaranties that may exist that they will not be repeated? It must be borne in mind that the offences that we are considering are not necessarily offences against the criminal laws, or even the laws of morality understood in their widest

sense. They may, some at least of them, be committed innocently from inattention, or carelessness, or a wrongful conception of obligation, such for instance as one trifling and perhaps inadvertent departure from the authorized ritual of the Church.

I cannot see my way to a conclusion that the Legislature plainly intended that all these offences should be made the subject of prosecution without discretion or limit. Still less can I perceive with any certainty, that the public benefit—the rights or benefit of individuals, or the requirements of justice—to say nothing of the due and efficient discipline of the clergy, and the best interests of the Church, require the indiscriminate prosecution of everything in the conduct of every clergyman which may legally constitute an ecclesiastical offence. So far, then, from the nature of the subject excluding the intention of conferring a discretion, it is one in my opinion in which a discretion is loudly called for, and would naturally be expected. The language of the clause itself, both in the provisions it contains, and still more in what it omits, points in the same direction. I cannot do better here than quote Lord Justice *Bramwell*. "There is no provision," he says (1), "regulating who is to be the complainant; it may be any one, man, woman, or child, Churchman, or other, for aught I can see. There is no provision how the complaint is to be made, by writing, or verbally, no provision how, if it all, it is to be verified; no provision that the complainant shall undertake to prosecute, or shall be liable to costs, no provision as to the character or nature of the offence; how far its prosecution may be desirable in the interests of religion, or morality; not a word as to its being possibly an isolated offence, and unintentional, and atoned for; nothing as to the motives or object of the complaint." I agree with the Lord Justice that the absence of all provision and limitation on these heads points strongly to the probable intention that a discretion should be vested in some one as to the cases in which a commission should issue; and that such a discretion should be reposed in the bishop, whose office it is to guide, correct, and control the clergy is exactly what might have been expected in an Act for the regulation of Church discipline. He is the person who, above all others, has the means and opportunity of knowing the character

(1) 4 Q. B. D. at p. 551.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Penzance.

and conduct of an offending clergyman, the condition and circumstances of his parish, and the probable motives of those who charge the offence—and, above all, whose position may enable him to interpose admonition, and advice, which may render recourse to the law unnecessary.

But (still comparing the present case with the authorities above cited), the strongest point of contrast remains to be stated. For, in place of a duty being inferred and enforced, as in those cases, in order to do justice to the legal rights of an individual, if a duty be inferred at all from the provisions of this statute, its exercise may be called for at the instance of a complainant who has not only no legal right, but perhaps no interest, immediate or remote, in the exercise of the bishop's power; inasmuch as the statute makes it possible for any man to be a complainant, no matter where resident, and no matter whether Churchman, Nonconformist, or Roman Catholic, Christian, Jew, or Mohammedan. I cannot think that the intention of this statute was to maintain the discipline of the clergy by vesting the power of legal prosecution, without limit, in the community at large.

The conclusion, then, at which I arrive is, that the Appellant has not established his case. The words "it shall be lawful" are permissive and enabling only. It devolved upon him to shew that the Legislature intended the exercise of the power, thus conferred, to be a duty, in the performance of which the bishop was not intended to have any discretion, and he has, in my opinion, failed to shew it.

With regard to the particular circumstances of the present case, I forbear to make any remark. Being of opinion that the permissive words of the statute ought not to be held to have created a duty in the bishop to issue a commission without any discretion in the matter, I forbear to inquire whether that discretion has been well exercised. It may be that it has not; and I am not insensible to the weight of the argument that, if bishops have a discretion in such matters, it is a discretion without appeal and free from legal control. It may, therefore, be abused; but so may a discretion in whomsoever vested; and, in the possibility of abuse, I see no reason to believe it unlikely that the Legislature intended to confide the discipline of the clergy to the good sense and good

faith of the bishops, upon whom, in the earlier history of the Church, the task of correction exclusively devolved.

LORD SELBORNE:—

My Lords, the use of inexact language in the statement of reasons for judicial decisions, (though nothing may turn upon it in particular cases determined upon sound principles,) is sometimes liable to become a starting point in other cases towards erroneous conclusions. This appears to me to have happened in the Court of first instance in the present case. The language, (certainly found in authorities entitled to very high respect,) which speaks of the words "*it shall be lawful*," and the like, when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

The present question is, whether it can be shewn, from any particular words or provisions of the *Church Discipline Act*, or from the general scope and objects of that statute, that it is the duty of a bishop, whenever a complaint is made to him under the 3rd section, to issue a commission of inquiry, with a view to penal proceedings if a *primâ facie* case should be made out? The words "it shall be lawful," &c., give him the power to do so; but this is a power, not in aid of any private right, nor for the due course and administration of justice after the commencement of any prosecution or suit; it is altogether initiatory and preliminary. The argument from the collocation of the words "if he shall think fit" in the immediate context is, in my opinion, much too slender and uncertain to justify the inference that in the earlier branch of

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Selborne.

the sentence, where those words do not occur, obligation, and not mere power, must have been intended. Apart from those words, the only proof offered of the alleged duty, consists in the assumption that the public must always have an interest in the punishment of every clergyman offending against any part of the Ecclesiastical Law. I cannot make that assumption.

The Legislature did, no doubt, give the power in question to the bishop, in trust and confidence that every person chosen to fill, and who had accepted, so high an office would be properly sensible of the duty of maintaining the authority of the law, and would, in proper cases falling within his jurisdiction, use the powers intrusted to him for the correction of offences against that law for the purposes for which they were given. But it is perfectly consistent with that proposition, that it may have been intentionally left to the discretion of the bishop to judge what were proper cases for the exercise of those powers. I cannot accede to the suggestion made at the Bar, that a bishop, if he had such a discretion, might be supposed liable to use it in opposition to the authority of the law, or as a means of dispensing with obedience on the part of his clergy, to any requirements of the law which might not be in accordance with his private views. The Legislature, in my opinion, neither contemplated nor provided against any such case, the occurrence of which was not, when the Act was passed, and is not now, within the bounds of reasonable probability.

The very great preponderance both of practical reason, and of public convenience, and of the inferences to be drawn from what is, and what is not, contained in the statute itself, seems to me to be against the supposition that the Legislature did intend, by this Act, to make it the duty of a bishop to inquire by commission into every imputation of an ecclesiastical offence, or of a scandal, or evil report of such an offence against a clergyman, which might be brought before him in the way of complaint by any person whomsoever. It is at least not obvious that it would be for the interest either of the church or of the state to open, or leave open, so very wide a door to private intolerance, contentiousness, uncharitableness, or folly. Every passage in a book or sermon to which any individual of different doctrinal views might, in proper form impute heresy, or inconsistency with the Thirty-nine Articles;

every trivial omission or irregularity in the conduct of Divine Service, even on points where the law might be in practical desuetude; every venial act of misconduct, atoned for by the offender, and condoned by every one having any real interest in his ministrations; every impertinent and groundless scandal, believed in by nobody whose judgment was of any value;—might thus be made the subject of an enforced inquiry, which from the beginning might be seen to be vexatious and useless, and perhaps very costly and mischievous; and that, at the instance of a person without either private interest or public responsibility. The bishop would be called in by the statute, for the first time (instead of a Court or Judge), not to exercise his episcopal judgment with any view to the good of the Church, the peace or good order of the diocese, or the general spiritual interests of his clergy or laity, but as a passive ministerial officer, to do what he might have the strongest reasons in the world to disapprove. He might have read the book or sermon, and have found it perfectly unobjectionable; he might have received the most unreserved submission to his own judgment in the supposed case of ritual irregularity, and such irregularity might have been wholly discontinued; he might be convinced on the best possible grounds that ample reparation had been made for any other kind of error; or that any alleged scandal was merely malicious and contemptible; and yet he would be compelled to proceed. The complainant might be, not (like the Appellant in this case) a parishioner, but a stranger, neither answerable in costs, nor even offering to substantiate his own accusation; the statute making no regulation itself, nor enabling any to be made, either as to the form or manner of the complaint, or as to its verification, or as to any costs of the inquiry demanded.

I cannot collect, nor can I presume, that this was the purpose of the Legislature—I do not think it reasonable, and I agree that the present appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, in this case the Appellant charged the incumbent of a parish within the diocese of *Oxford* with having committed within that diocese offences against the Laws Ecclesiastical. The

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Blackburn.

charges are all of such a nature that proceedings might have been taken in respect of them under the *Public Worship Act*. And one point made on behalf of the Respondents was that the proceedings ought to have been taken under that Act. All the Judges below agreed that proceedings could still be instituted under the *Church Discipline Act*, which applies to any offence against the Laws Ecclesiastical by a clerk in holy orders, though the offence charged was of such a nature that proceedings might have been taken under the later Act. This point was given up at your Lordships' Bar, and is clearly not tenable. [His Lordship then proceeded to state the facts of the case.]

The question before this House depends upon the construction of the *Church Discipline Act*, for if the Legislature cast on the bishop of a diocese the absolute duty of forwarding inquiry in one or other of these two ways, there can be no question that the bishop has not fulfilled that duty, and there can equally be no question that there is power by mandamus to require him to fulfil a duty cast upon him by a statute. But if the Legislature gave the bishop power to grant farther inquiry in one of those two ways, trusting that he would always do so where it was proper, but leaving it open to him, when convinced that it was not proper, to decline to act; if, in short, the intention of the Legislature was to make it lawful for him to act, if convinced that it is expedient, but to leave it to his discretion to say whether it is expedient, the mandamus will not lie.

The Court of Law does not sit as a Court of Appeal from the bishop to say whether he has exercised his discretion, if he has one, wisely or not; though if he has no discretion it may compel him to fulfil his duty, and act.

The question as to the construction of this particular Act was directly raised in *Reg.* v. *Bishop of Chichester* (1), and there Mr. Justice *Wightman* thought that the bishop had discretion, and made that the ground of his decision. But the Court of Queen's Bench did not so decide; Mr Justice *Hill*, who was the only other member of the Court at the time the decision was made, based his judgment entirely on the discretionary power of the Court of Queen's Bench to refuse a writ of mandamus. Lord *Campbell* and

(1) 2 El. & El. 209.

Sir *William Erle*, who had been members of the Court when the rule was argued, but had ceased to be so before it was decided, authorized Mr. Justice *Wightman* to state that they were of opinion that the rule should be discharged, but he did not state on which ground. It seems probable that Lord *Campbell* would have decided on the ground that he agreed with Mr. Justice *Wightman* on the construction of the Act, and Sir *William Erle* on the narrower ground taken by Mr. Justice *Hill*. There have, since that time, been several expressions of judicial opinion on the construction of this statute; none of them decisions, but, being *dicta*, not irrelevant to the subject under consideration, of weight as authorities, though none, I think, of so much weight as the opinion of Mr. Justice *Wightman*, because in none of them was it the *ratio decidendi*, as it was with him. Lord Justice *Bramwell* says, "I cannot but think we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think at least none but the ultimate Court of Appeal should overrule opinions so expressed, even if that should, as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great Judges have doubted much whether, if wrong, the only remedy was not in the Legislature."

I quite agree that where, from the nature of the decision, there is reason to believe that rights have been regulated and arrangements as to property made on the faith that the law was as laid down, it may be right to follow the decision even if wrong. On this I had occasion to express my views in the recent case of *Davidson* v. *Sinclair* (1). But I do not think that this is such a case. Whilst I agree with what I understand to be Lord Justice *Thesiger's* opinion, that the preponderance of authority in favour of the view that under this statute the bishop has a discretion, is great, I cannot think with Lord Justice *Bramwell* and Lord Justice *Baggallay*, that the question was, even in the Queen's Bench Division, concluded by authority, and still less that it is so in this, the highest Court of Appeal. I agree that before deciding that such a preponderance of authority was based on a mistake, the

(1) 3 App. Cass. at p. 788.

H. L. (E.) 1880

JULIUS v. LORD BISHOP OF OXFORD.

Lord Blackburn.

case should be considered carefully; and I have no doubt that the Judges of the Queen's Bench Division did so consider it.

I have, myself, come to the conclusion, independently of those opinions, that, applying the general principles of law as to the construction of statutes, to this statute, there is no duty cast on the bishop enforceable by mandamus, unless, perhaps, a duty to hear and consider the application of the party complaining, which, in this case, the bishop has done. The case has now been so carefully and elaborately discussed, that I think I may properly at once proceed to the point, where what is, in my opinion, the fundamental error, that which I consider the fallacy, in the judgment of the Queen's Bench Division, lies. That judgment treats the words "it shall be lawful" as ambiguous words, capable of bearing several meanings. And then says "we start with an established canon of construction, namely, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning;" and after referring to *Re Newport Bridge* (1), where it had been laid down that the words "it shall be lawful" *primâ facie* import a discretion, the judgment proceeds: "but though the rule thus laid down may hold good in the general run of statutes, in those of the class to which the *Church Discipline Act* belongs, a different rule has prevailed for a very great length of time, and is now fully established." Cases are cited in support of this position: *Rex* v. *Barlow* (2); *Macdougal* v. *Paterson* (3); *Morisse* v. *Royal British Bank* (4); *Crake* v. *Powell* (5); *Reg.* v. *Tithe Commissioners* (6), and an American case of *Supervisors* v. *United States* (7). It then comes to the conclusion that they establish that the words which the judgment considers ambiguous, and, in an ordinary statute, *primâ facie* only, are in a statute relating to public justice, and of general interest and concern, to be deemed *primâ facie* obligatory.

If this were the established canon of construction it would not conclusively shew that the words were in this statute obligatory, but it would be a very important step in that direction. But I

(1) 2 El. & El. 377.
(2) 1 Salk. 609.
(3) 11 C. B. 755; 21 L. J. (C. P.) 27.
(4) 1 C. B. (N.S.) 67; 26 L. J. (C. P.) 62.
(5) 2 El. & Bl. 210.
(6) 14 Q. B. 474.
(7) 4 Wall. 435.

think that there is no such established canon of construction. I am not aware that it has ever in any previous judgment been laid down, and I think that all of the cases which in the judgment are cited in support of the position so laid down, and all the other cases of which I am aware, in which words in terms empowering have been held to be imperative, are to be supported on a different principle.

I do not think the words "it shall be lawful" are in themselves ambiguous at all. They are apt words to express that a power is given; and as, *primâ facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *primâ facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it: that depends on the nature of the duty and the position of the donee. The earliest case in point of date in which I find this doctrine touched on is *Alderman Backwell's Case* (1). The statute 13 Eliz. c. 7, s. 2, enacted that the Lord Chancellor or Lord Keeper, upon every complaint made to him in writing against such person, being bankrupt, "shall have full power and authority by commission under the great seal of *England*," to issue a commission, and this power was, by 1 Jac. 1, c. 15, s. 3, extended to bankrupts under that Act. When the Exchequer was closed in 1676, many bankers who had deposited their money there were unable, in consequence of the bad faith of the Government, to meet the demands of their own creditors. Alderman *Backwell*, who was one, fled to *Holland*, leaving his son to make what terms he could with the creditors, and apparently the Government helped him. Lord Keeper *North* seems to have done all he could, and a great deal more than he ought, and kept the creditors at bay for seven years. But at last, in 1683, even he could not delay longer, and according to the

(1) 1 Vern. 152.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Blackburn.

report "the Lord Keeper declared, though the words in the Act of Parliament were that the Chancellor *may* grant a commission of bankrupt, yet that *may* was in effect *must*, and it had been so resolved by all the Judges, and the granting of a commission was not a matter discretionary in him, but that he was bound to do it." I have already pointed out that the word "may" does not occur in the statute; but, as I have already said, it is not inaccurate to say that the words conferring a power are equivalent to *may*.

In one of the County Courts Acts, 13 & 14 Vict. c. 61, s. 13, the words used were that, on its being proved by affidavit by the plaintiff that the cause was one in which there was concurrent jurisdiction, the Court in which the action is brought or a Judge at Chambers "may thereupon, by rule or order, direct that the plaintiff shall recover costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this Act had not passed." The Court of Exchequer had, in *Jones* v. *Harrison* (1), construed this as giving the Court a discretionary power to refuse the rule. That being a decision on which no appeal lay, was not binding on a Court of co-ordinate jurisdiction, and the Court of Common Pleas in *Macdougal* v. *Paterson* (2), and the Court of Queen's Bench afterwards in *Crake* v. *Powell* (3), held a contrary opinion.

In the judgment of the Common Pleas Chief Justice *Jervis* says that "may" was, "as we think, aptly and properly used to confer on the Court an authority," and later states the rule to be "that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." And in *Crake* v. *Powell*, Lord *Campbell* says: "If the plaintiff be entitled to costs, and the Court or Judge is empowered to make a rule or order for that purpose *ex debito justitiæ*, he may call upon the Court or Judge to do so." *Morisse* v. *The Royal British Bank* (4) was on the same principle.

But there are cases in which the authority or power given is

(1) 6 Ex. 328.
(2) 11 C. B. 755; 21 L. J. (C.P.) 27.
(3) 2 El. & Bl. 210.
(4) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62.

not to do a judicial act, and yet there is a duty on the donee to exercise the power if it appears to be given to the donee for the purpose of making good a right, and he is called upon by those who have that right to exercise the power for their benefit.

The 14 Car. 2, c. 12, s. 18, reciting that constables, &c., may be at charges in enforcing the poor law, and as yet have no power to make rates to reimburse themselves, enacts "that all constables, &c., so out of purse as aforesaid, together with the churchwardens and overseers of the poor and other inhabitants of the parish, shall hereby have power and authority to make an indifferent rate, and to tax all the inhabitants, &c." The inhabitants of several parishes of *Derby* seem to have combined to refuse to make any rates for this purpose; an indictment was preferred against them, which was removed into the King's Bench, and on motion to quash it the Court refused to do so. The case is reported under different names in different books (1). The report in *Salkeld*, under the name of *Rex* v. *Barlow*, is in the following words: "Exception was taken that the statute only puts it in their power to do so by the word 'may,' &c., but does not require the doing of it as a duty for the omission of which they are punishable: *sed non allocatur*. For where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall;' thus, 23 Hen. 6 says the sheriff may take bail. This is construed he shall, for he is compellable so to do."

The word "may" does not occur in the 14 Car. 2, c. 12, nor in the 23 Hen. 6, where in the Norman-French version the words are "*lesseront hors de prison*," and in the English version "shall let out of prison;" but both are apt illustrations of the rule that though giving a power is *primâ facie* merely enabling the donee to act, and so may not inaccurately be said to be equivalent to saying he may act, yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him so to do. And this is equally the case where the power is given by the word "may," if the object be clear. Thus in the *Public Health Act*, 1848 (11 & 12 Vict. c. 63, s. 89), the words are "The Local Board of Health *may* make rates

(1) Salk. 609; Skin. 370; Carth. 293.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Blackburn.

prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate;" yet on the application of a judgment creditor a mandamus will go to compel the making of a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained: *Rex* v. *Rotherham Local Board* (1); *Worthington* v. *Local Board of Moss Side* (2).

In *Reg.* v. *Tithe Commissioners* (3) Justice *Coleridge*, in delivering the considered judgment of the Court, says: "The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." The only part of this to which exception can be taken is the use of the word "public"; if by that it is to be understood either that enabling words are always compulsory where the public are concerned, or are never compulsory except where the public are concerned, I do not think either was meant. The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. The personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, the rights of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid, were all private rights. I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power. I

(1) 8 El. & Bl. 906. (2) Law Rep. 1 Q. B. 63.
(3) 14 Q. B. 474.

should say, for instance, that if, by enabling words, a Court is empowered to pass sentence on one convicted of a crime, it would be the duty of the Court to pass that sentence. But I cannot agree with the Court of Queen's Bench, that whenever the statute is for the public good, and of general interest and concern, powers conferred by enabling words are, *primâ facie*, to be considered powers which must be exercised. And I cannot agree that in the statute now in question there is either a private, or a public right, requiring that this power given to the bishop must be exercised.

No doubt it is very desirable that the Ecclesiastical Law should be observed; and, both with the view that it should be observed, and with the view to punish those who have transgressed, it is very desirable that there should be the means of bringing to trial, and, on conviction, of punishing, transgressors against that law. But does it follow that it is desirable that it should be in the power of any individual to insist on a prosecution in every case? The author of the Apology (said to be the Dean of the Arches in the reign of *Elizabeth*) did not think so. He says that the proceedings must be by the office of the Judge, and "the Judge needs not lend his assistance but where he sees good and probable inducements to ground it upon."

Lord *Stowell* uses language in *Maidman* v. *Malpas* (1), often quoted, so like that used in the Apology as to make me think he had that passage on his mind.

It is true that where due security for costs was given the Judge did not, in practice, refuse his assent, so that there was not a practical check on the improper institution of criminal proceedings in the Ecclesiastical Courts. And it is also true that, in prosecutions for temporal crimes in the temporal Courts, any private person may institute a prosecution, and that the only check provided by the Common Law is that the Attorney-General may take the prosecution out of his hands, or enter a *nolle prosequi*. And it is also true that in *England* that power is rarely exercised. But every one who has had experience in Criminal Courts must know that cases do occur in which every one thinks it would be much better that there should be no prosecution. And some (I allude more particularly to prosecutions for bigamy) in which, though

(1) 1 Hag. Cons. 205.

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Blackburn.

there was a conviction, the Judge has said that the prosecution was so improper that he would not allow costs. I do not say that in all these cases the Judge was right, and the private prosecution wrong—far from it; but in every such case the Judge must have thought that it was not for the public benefit that the prosecution should be instituted, though there was a breach of the law.

At Common Law the Master of the Crown Office, being the Queen's Coroner and Attorney in the Queen's Bench, could file *ex officio* informations in that Court for any misdemeanors; and a practice had arisen before the Revolution, by which he allowed any one to file an information in his name. This was very analogous to promoting the office of the Judge in an Ecclesiastical Court. By 4 & 5 Wm. & M. c. 18, s. 2, he was forbidden to do so "without express order to be given by the Court, in open Court." At first it seems to have been thought that the Court ought to grant that leave if it was shewn that there was a breach of the law; but it has been long held discretionary. In *Rex* v. *Stacey* (1) Lord *Mansfield* says (speaking of *quo warranto* informations), "But now since these matters have come more under consideration, it is no longer a motion of course, and the Court is bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation." And this has been acted on repeatedly: see *Rex* v. *Parry* (2); *Rex* v. *Rector of Lambeth* (3); and *Reg.* v. *Ward* (4). It is difficult, in the face of these authorities to say, that it is impossible to suppose that the Legislature could have intended to leave the bishop power to consider all the circumstances of the case before he takes a step which may disturb the peace and quiet of the Church, and of his diocese. And at Common Law the prerogative writs of mandamus, prohibition, and certiorari were not writs of course. The Court, when called on to issue them, always exercised a discretion. See the authorities collected in *Reg.* v. *Justices of Surrey* (5).

It is true that the Courts always thought it their duty to grant the writ where the party applying had a special interest in asking

(1) 1 T. R. 1.
(2) 6 Ad. & E. 810.
(3) 8 Ad. & E. 356.
(4) Law Rep. 8 Q. B. 210.
(5) Law Rep. 5 Q. B. 466.

it. And those who framed the *Church Discipline Act* seemed to have had this in view, as they have, by sect. 19, said that nothing should affect or hinder any person from executing the right to institute as voluntary promoter, or from prosecuting in such form and manner, and in such Court, as he might have done before the passing of this Act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining, or establishing any civil right. This goes far to shew that it was thought that, but for this section, the prosecution even in such a case would have been subject to the control of the bishop.

It is also true that, in exercising their discretion, the Courts have thought it very material to inquire whether the applicant was a mere busybody and makebate, or was a person who had an interest, though it fell short of what would fall within the terms of sect. 19. And I am far from saying that the bishop should not, in this case, have considered, as one of the elements to guide his discretion, that the applicant was a parishioner. But it was only one element. The Act is general. It allows prosecutions for immorality in which a parishioner is hardly more grieved than any neighbour. And it applies to clerks who have no preferment, and consequently can have no parishioners; and, if the bishop has no discretion, he must in every case act on the application of any party. I certainly cannot see any sufficient ground for saying that the object of the statute is such as to lead to the conclusion that the Legislature must have intended to oblige the bishop to exercise the power which, *primâ facie*, he is entitled to refuse to exercise. And certainly, if discretion is to be entrusted to anyone, the bishop is the fittest person to whom to trust it. It is very true that bishops are but men, and being human may misuse any discretion entrusted to them; but so are Judges, and so are the parties who make a complaint. And it seems strange to say that the Legislature, which has not provided that there shall always be a prosecution, but has left that to the discretion of any one who likes to interfere, could not trust any discretion to a bishop, who, to say the least, is not more likely to err than any voluntary prosecutor.

My Lords, I do not think it necessary to examine the words

H. L. (E.) 1880 JULIUS v. LORD BISHOP OF OXFORD. Lord Blackburn.

and clauses and the history of the Act. I have considered them, and find nothing to lead me to think that it was intended to make the exercise of the power conferred on the bishop imperative in all cases, though conferred by words *primâ facie* discretionary.

I see no reason for departing from the rule by which costs are given to the successful party.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 23rd March, 1880.

Solicitor for Appellant: *James Girdlestone.*

Solicitors for Respondent: *Cunliffe, Beaumont, & Davenport; Brooks, Jenkins & Co.*

[HOUSE OF LORDS.]

DUNDAS . . . . . APPELLANT;
WADDELL . . . . . RESPONDENT.

H. L. (Sc.)
1880
Feb. 27.

Teinds—Res Judicata.

The minister of the parish of *B.*, *Scotland*, in 1875 raised an action of augmentation, modification, and locality, against the heritors. A scheme of locality was prepared, *D.* lodged objections to the scheme, in so far as it localled minister's stipend on eighty-one acres of his land, alleging that these eighty-one acres were held under titles *cum decimis inclusis et nunquam antea separatis*, and that in respect of certain judicial proceedings in 1795 and 1807 it was *res judicata* that these lands were so held.

The proceedings relied on were as follows: In 1795 the then minister of *B.* raised an action of augmentation, &c., and produced a rental of the whole lands in the parish, in which he included the eighty-one acres in question as liable for teinds. The ancestor of *D.* "and the other heritors" lodged a minute stating, *inter alia*, that these eighty-one acres were held *cum decimis inclusis*, and craving that they might be struck out of the rental. On the 2nd of December, 1795, the teind Court pronounced an interlocutor ordering them to be struck out. Rectified schemes of locality were prepared, and objections lodged by other heritors, but the proceedings were not carried out to a final decree. In 1807 the same minister raised a new action of augmentation, &c., which, after certain objections were disposed of, proceeded to a final decree. In none of the schemes of locality since 1795 were the eighty-one acres included:—

Held, reversing the decision of the Court below, that the plea of *res judicata* was well founded.

APPEAL from the Court of Session in *Scotland*.

In 1875 the Rev. *Walter Waddell*, the Respondent, minister of the parish of *Borthwick*, raised an action of augmentation, modification, and locality against the heritors of the parish, with the object of obtaining an increase of his stipend. A scheme of locality was prepared by order of the Court. The Appellant, Mr. *Dundas* of *Arniston*, objected to the scheme of locality in so far as it localled stipend upon eighty-one acres of the lands of *Schank*, part of the mains of *Arniston*, his property. The grounds of his objections were (*a*), that these eighty-one acres were held under titles *cum decimis inclusis et nunquam antea separatis*, and were therefore teind free; and (*b*), that in respect of certain

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

judicial proceedings in 1795 and 1807 it was *res judicata* that these lands were so held.

The question to be first disposed of in this appeal was whether the plea of *res judicata* was well founded. It was said that the question involved not only the eighty-one acres but the whole of the mains of *Arniston*, which are of considerable extent.

The history of these eighty-one acres was shortly as follows: They were originally part of the mains of *Arniston*. The mains of *Arniston*, again, were part of the lands of the barony of *Ballintrodo*. This barony originally belonged to the *Knights Templar*, and on the suppression of that body passed, with the rest of the *Temple* lands, to the *Hospitallers*, or *Knights of St. John*. The last preceptor of *Torphichen*, the head of the *Knights of St. John*, was Sir *James Sandilands*, afterwards first Lord *Torphichen*. In 1563 he obtained from Queen *Mary* a grant of the whole lands belonging to the *Knights of St. John*, including the barony of *Ballintrodo*, with all the privileges and immunities which these lands had possessed when in the possession of the preceptors of *Torphichen*. In 1571 Lord *Torphichen* conveyed to the Appellant's ancestor, *George Dundas* and his wife, in liferent, and *James Dundas*, their son, in fee, the mains of *Arniston*, part of the barony of *Ballintrodo*. In 1598 Sir *James Dundas* of *Arniston* entered into a contract of excambion with *John Elphinstoun* of *Schank*, by which, in exchange for part of the lands of *Schank*, he conveyed to *Elizabeth Elphinstoun* of *Schank* in liferent, and the said *John Elphinstoun* of *Schank*, her son, in fee, eighty-one acres of the mains of *Arniston*.

In 1753 these eighty-one acres were re-acquired by the *Dundas* family, and have ever since remained in their possession. Being so long possessed by the owners of the lands of *Schank* they have been erroneously described as part of the lands of *Schank*, though really forming part of the mains of *Arniston*.

Neither the mains of *Arniston* nor these eighty-one acres have ever been liable for minister's stipend.

The proceedings which were founded on as supporting the plea of *res judicata* were as follows:—

On the 12th of March, 1795, the Rev. *John Clunie*, then minister of the parish of *Borthwick*, raised a summons of augmentation and locality. On this summons the whole heritors of the parish

were cited, including the Appellant's ancestor, *Robert Dundas* of *Arniston*, then the Lord Advocate of *Scotland*, and afterwards the Lord Chief Baron. Along with his summons the minister produced the following rental of the parish:

No.	Heritors' Names.	Valued Rent, Scots Money.			Real Rent, Sterling.		
		£	*s.*	*d.*	£	*s.*	*d.*
1	The Lord Advocate . . .	1907	10	4	1085	0	0
2	Mr. *Dewar* of *Vogrie* . . .	1859	15	5	1220	0	0
3	Mr. *Hepburn* of *Clerkington* .	1233	16	8	800	0	0
4	Mr. *Brown* of *Currie* . . .	403	0	0	250	0	0
5	Mr. *Cranstoun* of *Dewar* . .	116	5	7	120	0	0
6	Mr. *Borthwick* of *Crookston* .	80	10	0	35	0	0
		5600	18	0	3510	0	0

On the 17th of June, 1795, this interlocutor was pronounced:

The Lords allow the lawyers for the heritors to see the process in the clerk's hands till next Court day, and appoint parties' procurators to be then ready to debate. *Ilay Campbell*, J.P.D.

On the 2nd of December, 1795, a minute was lodged "for *Dundas* of *Arniston* and the other heritors" which "represented"

That the following lands, viz., the lands and town of *Arniston*, called the mains of *Arniston*, those fourscore and one acres of the lands of *Schank*, part of the mains of *Arniston*, and the lands called the *Park of Halkerston*, all lying in the same parish, were holden by *Dundas* of *Arniston cum decimis inclusis*, and therefore craved that those lands might be struck out of the rental.

The minute then went on to say that the teinds of certain other lands belonging to the heritors were valued conform to decreets of valuation produced, and

Therefore craved that the rental of the whole foresaid lands before specified contained in the respective decreets of valuation and approbation above mentioned ought to be restricted accordingly.

Then it was recorded by a note indorsed on the minute that

John Clerk, for the Pursuer (the minister) craved *avizandum*, with the decreets of approbation and valuation produced and condescended on; and that the heritors, who have no decreets of valuation, may be holden as confest on the rental libelled.

The following interlocutors were found also written on the minute:

Dec. 2, 1795. The Lords ordain the lands and mains of *Arniston*, those four-

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

score and one acres of the lands of *Schank*, part of the mains of *Arniston*, and the lands called the *Park of Halkerston*, to be struck out of the rental; make *avizandum* with the decreets of approbation produced and condescended on; hold the heritors who have no decreets of valuation as confest on the rental libelled; and remit to the Lord *Glenlee* to prepare the cause.

Ilay Campbell, J.P.D.

Dec. 9, 1795. The Lords allow the lawyers for Mr. *Dewar Voigre* to see the process in the clerk's hands till this day eight days, and appoint parties' procurators to be then ready to debate. *Ilay Campbell*, J.P.D.

Dec. 16, 1795. The Lords allow the lawyer for the heritors to see this process in the clerk's hands till the first sederunt day in January next, and appoint parties' procurators to be then ready to debate. *Ilay Campbell*, J.P.D.

A scheme of proven rental was then prepared in accordance with the above minute and interlocutors; and on the 13th of January, 1796, the Court granted an augmentation and remitted to Lord *Glenlee* to prepare a locality and to report.

On the 20th of May, 1796, the Lord Ordinary appointed *Robert Dundas*, W.S., common agent "for carrying on the process of locality of the Pursuer's (minister's) stipend and obtaining a decreet of locality therein."

A scheme of locality was then prepared, and to this Mr. *Dewar* of *Vogrie* lodged objections, in which he said *inter alia*:

The present rent of the parish of *Borthwick* amounts to about £3400 sterling, of which one-third or thereby belongs to the Lord Advocate, one-third to the memorialist, and the other third to Mr. *Hepburn* of *Clerkington*, Mr. *Brown* of *Currie*, Mr. *Cranstoun* of *Dewar*, and Mr. *Borthwick* of *Crookston*. The whole heritors have produced heritable rights to their teinds except Mr. *Borthwick* of *Crookston*, whose interest in the parish is very small. The teinds are all valued except those of a small part of the memorialist's estate. . . . The objector being led to think that the augmentation would fall upon all the heritors equally, or nearly so, declined to give any opposition on his part, and he now is likely to suffer for it, as he finds that the teinds of the greatest part of the Lord Advocate's (Mr. *Dundas'*) lands are held *cum decimis inclusis*, and some of those of the other heritors are said to be exhausted.

The objector then went to other matters which do not concern this appeal. On these objections the following interlocutors were pronounced by Lord *Glenlee*:

June 2, 1797. The Lord Ordinary allows all concerned to see and answer the foregoing objections.

June 10, 1797 The Lord Ordinary having considered these objections with the answers thereto for the common agent, repels the objections as to the altering

the old stipend of *Harvieston*, sustains the objection as to the rental of *Catcune*, and finds that the present rental of these lands must be the rule for striking the tiend and allocating the stipend, and remits to the clerk to rectify the locality accordingly.

A rectified locality was then prepared; and Lord *Glenlee*, on the 23rd of June, 1797, pronounced an interlocutor that "it ought to be approved of as an interim rule of payment of the Pursuer's stipend until the controversies among the parties be settled and a final locality established."

On the 5th of July, 1797, the Court approved of the Lord Ordinary's report, and decreed accordingly.

Against this rectified locality Mr. *Dewar* of *Vogrie* lodged the following objections:

A rectified scheme of locality has been made up and has been adopted as an interim locality, by which above thirty bolls of the augmentation are laid upon the objector, while the remaining eighteen bolls only are laid upon the other two-thirds of the parish.

The reasons given for this are that the bulk of the Lord Advocate's lands being held by his Lordship *cum decimis inclusis*, fall to be wholly exeemed, and that the teinds of some of the other lands in the parish are exhausted.

At a meeting of the agents it was admitted that, in as far as Lord Advocate's lands are granted *cum decimis inclusis*, and in as far as teinds of lands belonging either to his Lordship or to other heritors are exhausted, no part of the augmentation can be laid upon the one or the other; and, in order to come at the true state of the teinds, it was agreed that every heritor should give into the process an articulate rental and condescendence of his property, shewing—1st. The general names of his lands taken from his title-deeds; 2nd. The particular farms and possessions comprehended under these general names, and the names of the present tenants and rents; 3rd. Whether the teinds have been valued, and if there is an heritable right to them?

The necessity of having such rentals and condescendence will appear from the following example:—The decreet of valuation of the teinds of the parish 1629–30: Finds and declares that the lands and town of *Arniston*, called the mains of *Arniston*, with tofts, crofts, tenants, tenendrys, and pertinents thereof, pertaining to *James Dundas*, of *Arniston*, were set in feu, *cum decimis inclusis*, and that eighty-one acres of these lands had been excambed with Mr. *Patrick Edmeston*, for part of the lands of *Shank*.

In the first place, it is obvious that this grant of the mains of *Arniston* cannot include the whole estate of *Arniston*, the mains being no more than the farm in the natural possession of the heritor. But the matter is not left to conjecture; for upon inspecting his Lordship's titles, it does appear that his Lordship is possessed of the following lands, viz.: *Ryleknow*, *Hudspath*, *Mitchel's Lands*, seven butts of lands, *Birkenside*, *Taylor's* pendicle, *Rodger's* pendicle, *Castletown* and *Temple* lands of *Howburn*—all of them unvalued and liable to ministers' stipends. It is therefore incumbent upon Lord Advocate to shew what lands are

H. L. (Sc.)
1880
DUNDAS
v.
WADDELL.

truly comprehended under the word "mains," and the teinds of the rest of his estate of *Arniston* must be brought forward to take a share of the stipend.

In the next place, it is equally clear that his Lordship has produced no right to the teinds of that part of *Shank* which was acquired in exchange for eighty-one acres of the mains of *Arniston* given to Mr. *Edmonston*, of *Shank*; for the grant of the mains of *Arniston cum decimis inclusis* can never cover both the lands which were given away and those which were got in exchange, although such effect has been given to that grant in the decreet 1629–30, and also in making up the rectified scheme of locality of the minister's stipend.

In the decreet 1629–30, the teinds of the eighty-one acres which Mr. *Edmonston* had got from the mains of *Arniston* were not valued, because he had got them *cum decimis inclusis*; and in like manner the teinds of the rest of the mains of *Arniston* were not valued, because they were possessed *cum decimis inclusis*. But nothing is said in that decreet as to the teinds of that part of the lands of *Shank* which had been added to the mains of *Arniston* in exchange for the eighty-one acres. The teinds of these lands therefore clearly remain unvalued and subject to stipends, and the extent and value of them falls to be shewn by such a rental and condescendence as has been mentioned.

From what has been said, the objector humbly contends—first, that the mains do not include the whole barony of *Arniston*; secondly, that, in particular, it does not include the part of the lands of *Shank* which was got in exchange for the 81 acres; thirdly, that it is incumbent on Lord Advocate to shew what lands are included under the mains; and, fourthly, that it is also incumbent on him to shew the amount of the teinds of his other lands.

The objections then went on to refer to that part of the former objections dealing with other matters.

The following answers were put in by *Robert Dundas*, the Lord Advocate, to the above objections of Mr. *Dewar*:

Although it may be so far true, as stated in the objections, that such a rental and condescendence, as there alluded to, was talked of at the meeting of agents originally held upon the subject of the present locality; yet, when the state and situation of the Respondent's titles to his teinds came to be more minutely considered it appeared perfectly manifest that no such rental or condescendence was at all necessary, so far as regarded him, because he having held part of his lands *cum decimis inclusis*, and having obtained regular decreets of valuation and approbation as to the teinds of the remainder, there was occasion for nothing more than merely to produce the title deeds instructing the lands held *cum decimis inclusis*, and the extracts of the decreets of valuation as to the remainder, with a full and explanatory inventory, which was done, and the scheme of locality made out accordingly.

This much being premised, the Respondent shall, in a very few words, answer the objections to the locality now proposed in their order. And, first of all, it is said that the grant of the mains of *Arniston cum decimis inclusis* cannot include the whole estate of *Arniston*, the mains being no more than the farm in the natural possession of the heritor. But in answer to this it might be sufficient in general to retort by affirming that the Respondent never contended for the whole estate of *Arniston* being comprehended under the mains, because, besides the titles

to the lands held *cum decimis inclusis*, the Respondent, as already noticed, produced decreets of approbation to include the teinds of his whole other lands in the parish; though, at the same time, the Respondent can by no means admit the description of the lands held *cum decimis inclusis* to be of so confined a nature as the objector would represent it, which is made fully apparent by attending to the description itself, taken from the titles in the following words, "All and whole the lands and town of *Arniston*, called the mains of *Arniston*, with the tofts, crofts, tenants, tenandries, and pertinents thereof. . . ."

The Respondent shall, in the next place, advert to what is held forth by the objector in regard to the eighty-one acres of the mains of *Arniston* excambed with *Nicoll Edmonston* of *Shank*, as to which it is very plausibly contended that, in the decreet of valuation proceeding upon the report of the sub-commissioners in 1629–30, no notice is taken of the lands annexed or added to the mains of *Arniston* in exchange for the eighty-one acres thereof given to *Patrick Edmonstone* of *Shank*, and held by him *cum decimis inclusis*. But the conclusive answer to this is, that the *Edmonstones* of *Shank* were, besides the lands of *Shank*, also possesst of other lands, called the *Park of Halkerston*, which were, in fact, the lands given in exchange, so far back as the year 1599, for the eighty-one acres of the mains of *Arniston*, and have been enjoyed, alongst with the other lands of *Halkerston*, by the family of *Arniston* ever since. Now, upon looking into the report of the sub-commissioners in 1629–30, it will be observed that they take particular notice of the eighty-one acres given in exchange to *Edmonstone* of *Shank*, and held by him *cum decimis inclusis*. Consequently, it is not to be presumed that, with this evidently in their eye, the commissioners, when performing the business allotted to them and making out their report thereof, would omit also to value the teinds of the lands excambed and given in return to the family of *Arniston*. Accordingly, they have particularly valued the teinds of the lands of *Halkerston*, as appears from the report, which must be understood to comprehend the *whole lands*, and to include the *Park of Halkerston* exchanged for the eighty-one acres of the mains of *Arniston*, as well as the other parts thereof.

Again, with respect to the small pendicles or portions of land called *Ryleknow*, *Hudspath*, *Mitchel's Lands*, &c., specified in the Respondent's title deeds, as stated by the objector, the same answer applies, viz., that although they all belonged in 1629 to the family of *Arniston*, and formed part of the barony thereof, yet that none of these lands are to be found mentioned in the report of the sub-commissioners, for this plain reason, that, being very small pendicles, they were *included* and *absorbed* in some other *general* names, such as those of *Halkerston*, *Castleton*, *Esperston*, and so forth, all appertaining to the barony of *Arniston*.

On these objections and answers Lord *Glenlee* pronounced the following interlocutors:

June 5, 1800. The Lord Ordinary makes *avizandum* to himself with the objections of *James Dewar* of *Vogrie*, answers for the Lord Advocate, replies, duplicates, triplies, and quadruplies.

June 17, 1800. Having considered the rectified scheme of locality of the parish of *Borthwick*, these objections thereto, answers, replies, &c., and whole process repels the objections.

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

The proceedings then seemed to have dropped.

In 1807 another summons of augmentation, &c., was raised by the Rev. Mr. *Clunie*, and a scheme of localities was prepared. In consequence of the proceedings of 1795 the eighty-one acres were not inserted in any of them; but the Court having modified the minister's stipend at nine chalders, £70 sterling in money and £8 6*s.* 8*d.* for communion elements, the fact of the eighty-one acres being teind fee was strongly founded on by the heritors in their petition against that modification as a reason why such an increase should not be granted.

To the heritor's petition the minister lodged answers, in which he did not dispute the exemption claimed, but represented, *inter alia*:

> The next reason assigned by the Petitioners (heritors) for reducing the stipend is equally groundless. It is that the teinds of several of the heritors are exhausted, and that a great proportion of the best land in the parish is held *cum decimis inclusis*, owing to which the augmentation will fall principally upon Mr. *Mitchelson* of *Middleton* and Mr. *Dewar* of *Vogrie*. If your Lordships are to listen to such arguments as this, there will be an end at once to augmentations in almost every case, for the Respondent will venture to say that in no one parish in *Scotland* do all the heritors stand on the same footing with respect to their teinds. Some of them hold their lands *cum decimis inclusis*, some have purchased their teinds in the ordinary way, and some hold them in lease from the titular. But surely nothing of this kind ought to have the smallest weight with your Lordships in fixing what is a proper stipend for the clergyman. . . . If the Lord Chief Baron (*Dundas*), in the present instance, had such a right to his teinds as will free him from paying any part of the augmentation, the presumption is that he or his ancestors paid so much the greater a price for the lands; and, on the other hand, if Mr. *Mitchelson* and Mr. *Dewar* hold their teinds by a less favourable tenure, the presumption is equally clear that a smaller price in proportion was paid for their lands. It is quite foreign to the present question, therefore, to inquire, or at all to take into view, on whom the augmentation is to fall. The whole free teind of the parish is liable to and was set apart for paying an adequate stipend to the minister in preference to everything else, and the rights of the different heritors with great submission cannot be taken into view in the proceedings relative to the augmentation. In localling the augmented stipend, indeed, the Lord Ordinary will decide according to the different rights which each heritor holds to his teinds, but that is a subject with which the incumbent has no concern.

On the 9th of March, 1808, the Court altered their former interlocutor to the effect of fixing the stipend at eight chalders, £70 sterling, with £8 6*s.* 8*d.* for communion elements. There-

after a condescendence was given in by the heritors, in which the eighty-one acres are entered as being held *cum decimis inclusis;* and these lands were accordingly omitted from the locality, which received final sanction from the Teind Court, by decreet of modification and locality pronounced on the 8th of March, 1809.

In the present action of augmentation the Lord Ordinary in teind cases (1) repelled the objections for the Appellant. From this decision Mr. *Dundas* reclaimed to the Second Division, and they, owing to the difficulty of the question of *res judicata*, desired the co-operation of the Lords of the First Division. Out of the seven Judges before whom the case was debated three were for the Appellant and four against him; and on the 19th of December, 1878, an interlocutor was pronounced in conformity with the opinion of the majority repelling the plea of *res judicata* as unfounded (2).

On appeal,

1879. July 22, 31. *The Lord Advocate* (Right Hon. *W. Watson*), and Mr. *E. E. Kay*, Q.C. (with them Hon. *H. Moncreiff*), for the Appellant, contended that all the elements necessary to constitute *res judicata* were found in the proceedings of 1795. In that action the ground of exemption was the same as now; the parties here represented the parties to the judgment of the 2nd of December, 1795; and the minister of that day joined issue on the very same question, by including the eighty-one acres in his rental, and craving that, amongst other heritors who had no decreets of valuation, the Lord Advocate *Dundas* "should be held as confessed on the rental."

That judgment striking the lands out of the rental was pronounced *causâ cognitâ;* for the parties were ordered to be ready to debate; they were represented by counsel; and a decision was asked for on the same point; therefore the presumption was that that judgment was delivered after a discussion and consideration of the titles. But even if the Court did not apply their minds to the judicial consideration of the question, the judgment in the circumstances was none the less pronounced *in foro*, and was *res*

(1) Lord *Rutherford Clerk.*
(2) Court of Sess. Cas. 4th Series, vol. vi. p. 345; 16 Scotch Law Rep. 340.

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

judicata. See *Earl of Hopetoun* v. *Ramsay* (1); *Duke of Buccleuch* v. *Common Agent in the Locality of Inveresk* (2); *Thomson* v. *Lord Advocate* (3); *Graham-Bonar* v. *Lord Advocate* (4); *Lady W. D'Eresby* v. *Speir* (5); in which cases the plea of *res judicata* was sustained.

It was also competent for the Court to pronounce a final judgment at the augmentation and modification stage of the process; because it was most important for the minister to shew a large rental of free teinds otherwise he might not get an augmentation; and it was equally important for the heritor to produce valuations; prove his true rental; or establish his title to exemption altogether; see *Connell* on Tithes [2nd ed.], vol. i. pp. 457–8. For the result of being included in the rental was that, pending decree of locality, the minister was entitled to draw the whole of any of the heritor's teinds, leaving him to obtain relief against the other heritors in the locality; see *Buchanan* on Tithes, p. 249; *Hutcheson* v. *Earl of Cassillis* (6). And also there was here no reason why the question of the validity of the claim should be postponed to be decided in a locality—there being no intricate question attended with difficulty.

Once the lands were struck out the heritor had no further interest to appear, for there would be no reason, or justice, in the Court first striking the land out of the rental, and having disposed of the minister's claim for an augmentation on the diminished rental, then to allow the lands which had been struck out to be dealt with in the same manner as the lands which had not been struck out. In the subsequent proceedings in 1807, which ended in a final decree, the judgment of 2nd December, 1795 was dealt with as conclusive both by the minister and by the other heritors.

[They also commented on *Deans of the Chapel Royal* v. *Johnstone* (7); *Lord Blantyre* v. *Earl of Wemyss* (8); *Marquis of*

(1) Court of Sess. Cas. 2nd Series, vol. iii. p. 685; on appeal, 5 Bell's App. 69.

(2) Court of Sess. Cas. 3rd Series, vol. vii. p. 95.

(3) Ibid. vol. x. p. 849, at p. 852.

(4) Ibid. vol. ix. p. 58, at pp. 64, 65.

(5) 14 Scot. Law Rep. 162.

(6) Morr. 14,788.

(7) Court of Sess. Cas. 3rd Series, vol. vii. (H.L.) p. 19.

(8) Court of Sess. Cas. 1st Series, vol. xvi. p. 1009; reversed 3 Bell's App. 34.

Queensbury v. *Wright* (1); *Smith and Another* v. *Duke of Argyle* (2); see also *Shaw's* Teind Cases.]

Mr. *Kinnear*, and Mr. *B. Nicolson* (of the Scotch Bar), maintained for the Respondent that the processes relied on by the Appellant did not constitute *res judicata*, because the question whether the eighty-one acres were held *cum decimis inclusis*,—and therefore teind free — was never judically considered or determined by the Court. No titles were produced and discussed when the interlocutor of the 2nd of December, 1795, ordering the lands to be struck out, was pronounced. That interlocutor was delivered at the augmentation and modification stage of the case, when it was usual for the minister to lodge a rental of the lands in the parish for the purpose of giving a rough estimate of available teinds. Such rental was not for the purpose of settling conflicting rights of the heritors, for so long as there was sufficient free teind, as here, the omission or striking out of lands from the rental was immaterial. Further, at the augmentation stage of the process, it was the interest of the heritors to concur in land being struck out, so as to keep down the minister's stipend; but in the locality, when the augmentation previously allowed has to be apportioned, the heritors' interests conflicted. And it was in a locality that a discussion is ordered of the various claims to exemption; which discussion afforded ground for a judgment by the Lord Ordinary. Here, in the interlocutors subsequent to the augmentation no question relating to the claim of the Lord Advocate *Dundas* was raised.

Then, as long as there was enough free teinds, it was unnecessary for the minister to join issue with the heritor claiming exemption; that would be a serious hardship and no benefit. In the second process of augmentation the minister had no interest to, and the heritors did not, challenge *Dundas's* claim, it therefore went by consent, which could not form *res judicata*.

[They commented on the cases of *Orr* v. *Earl of Glasgow* (3) and *Minister of Yester* v. *Marquis of Tweeddale* (4), cited in *Frood*

(1) Court of Sess. Cas. 1st Series, vol. xiv. p. 1021.
(2) Morr. 12,215.
(3) Court of Sess. Cas. 3rd Series, vol. v. p. 195.
(4) Ibid. vol. v. p. 592.

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

v. *Earl of Stair* (1); *Erskine* v. *Common Agent in the locality of Crail* (2); *Thomson* v. *Earl of Zetland* (3); *Earl of Moray* v. *Inglis* (4); and *Connell* on Tithes, vol. i. p. 450.]

The Law Peers, having considered their judgment, delivered the following opinions:—

Feb. 27. EARL CAIRNS, L.C.:—

My Lords, in this case, on the question of *res judicata*, which is the only question for the determination of your Lordships, the Lords of the Second Division of the Court of Session consulted with the Judges of the First Division, and your Lordships have the judgments of the Lord Justice Clerk, Lord *Ormidale*, and Lord *Mure*, supporting the plea of *res judicata*, and the judgments of Lord *Deas*, Lord *Gifford*, and Lord *Shand* repelling it. With these latter judgments the Lord President concurred, and the Court accordingly rejected the plea by a majority of four to three.

My Lords, I should have felt great hesitation in dissenting from the opinion of the Court of Session, or even of a majority of the Court, if the question had been a question of Scotch teind law. In the view, however, which I take of the case, the question appears to me to be rather one of the proper construction to be put upon certain proceedings of the Court nearly a century old, a question upon which it is not unnatural, as indeed is shewn by the division in the Court below, that judicial minds should differ.

The present proceeding is an action of augmentation, modification, and locality, raised by the minister of the parish of *Borthwick* against the heritors of the parish. The Appellant is one of those heritors, and the question is whether eighty-one acres of land in the parish belonging to him are or are not teind free. The Appellant alleges that in a former proceeding of augmentation, modification, and locality, which was commenced in the year 1795, at the instance of the then minister of the parish, it was *res judicata* that these eighty-one acres of land were teind free, and it is upon the validity of this allegation or plea of the

(1) Court of Sess Cas. 4th Series, vol. ii. p. 76.

(2) Court of Sess. Cas. 3rd Series, vol. iii. p. 49.

(3) Court of Sess. Cas. 3rd Series, vol. vii. p. 99.

(4) Court of Sess. Cas. 1st Series, vol. xv. p. 2.

Appellant that the learned Judges of the Court of Session were, as I have said, divided in opinion.

The interlocutor of the Court in the proceedings of 1795, which is said to have established, as *res judicata*, that these lands were teind free, was made shortly after the commencement of the proceedings, and one of the points strongly argued in the Court below and before your Lordships was that no adjudication on such a question is usual at that stage of the proceedings.

My Lords, I can understand many reasons why, as a general rule, it would be more convenient to postpone the decision of such a question to a later stage of the proceedings. The minister wishes to have an augmentation of his stipend, and for this purpose to shew that there is a sufficient quantity of free teinds in the parish. He has no object in entering on a litigation as to the amount of the augmentation which the different heritors should, as among themselves, bear; nor, provided there are sufficient teinds for his purpose arising from other lands, has he any object in opposing a heritor who says his lands are altogether teind free. In like manner, the heritors at the outset may well be disinclined to litigate among themselves as to whether particular lands are teind free, or as to the amount which each must bear, until they find that the minister has succeeded in obtaining an augmentation, and know what the amount of the augmentation is.

On the other hand, there are obvious reasons which would make it convenient that a heritor who can shew his lands to be teind free should establish this as soon as possible; for if he can establish it, it relieves him, especially if he have no other land in the parish, from the trouble and burden of watching or intervening in the further progress of the litigation.

But, my Lords, what is important is, that I do not find that any of the learned Judges who have repelled the plea of *res judicata* anywhere say that it was not competent to the Court, if the minister and heritors properly raised the question, to decide at the outset that particular land was teind free. They say it was not usual to do so, the consideration of the question might have been adjourned, the Court might have refused *in hoc statu* to entertain it, or the Court might have ordered a proceeding of declarator to have the question decided. But the learned Judges nowhere say that if

H. L. (Sc.) 1880 DUNDAS v. WADDELL. Earl Cairns, L.C.

the Court should entertain and decide the question in the first stages of the proceedings, the decision would be invalid.

Bearing this in mind, I will now point out to your Lordships what actually took place in 1795. On the 12th of March of that year the summons for augmentation, modification, and locality, at the instance of the Rev. *John Clunie*, the minister, was signeted. The whole of the heritors of the parish were cited, including the ancestor of the Appellant. Along with the summons the minister produced a rental of the parish of *Borthwick*, containing, among other lands, the eighty-one acres in question. An interlocutor of the Teind Court, dated the 17th of June, 1795, was pronounced in these words: "The Lords allow the lawyers for the heritors to see the process in the clerk's hands till the next court day, and appoint parties' procurators to be then ready to debate." The next entry on the proceedings is of the 2nd of December, 1795. On that day a minute was given in "for *Dundas of Arniston* and the other heritors" (*Dundas of Arniston* being the predecessor of the Appellant), which "represented that the following lands," *inter alia* the eighty-one acres, "were holden by *Dundas of Arniston, cum decimis inclusis*, and therefore craved that these lands might be struck out of the rental." Your Lordships, therefore, have here, in language as to which there can be no doubt, the ancestor of the Appellant alleging, and all the other heritors of the parish concurring in the allegation, as against the minister, that these eighty-one acres were teind free, and calling on the Court, because they were teind free, to strike them out of the rental.

The issue as to whether the lands were or were not teind free was thus distinctly presented. The Court might have refused to entertain or to decide it, or the minister might have called upon the Court to adjourn the consideration of it. On the other hand, the Court had power to decide the question if it thought fit, and if no sufficient reason was given why the decision should not take place.

The next entry we have is the note indorsed on the minute, that "*John Clerk*," who was the advocate for the minister, "craved avizandum with the decreets of approbation and valuation produced and condescended on; and that the heritors who have no

decreets of valuation may be holden as confest on the rental libelled." On the same day the Court pronounced this interlocutor: "The Lords ordain the lands and mains of *Arniston*, those fourscore and one acres of the lands of *Shank*, part of the mains of *Arniston*, to be struck out of the rental; make avizandum with the decreets of approbation produced and condescended on; hold the heritors who have no decreets of valuation as confest on the rental libelled; and remit to the Lord *Glenlee* to prepare the cause."

Accordingly the eighty-one acres were struck out of the rental, and did not again appear in any of the subsequent proceedings.

My Lords, I cannot put any construction upon these words other than this, that there was an issue raised by the ancestor of the Appellant, with the concurrence of the other heritors, that the eighty-one acres were teind free, and, *ergo*, ought to be struck out; that this issue was raised and adjudicated upon in the presence of all proper parties, and that the Court, by striking out the eighty-one acres, pronounced the judgment which the heritors had called for.

My Lords, I observe it is said by some of the learned Judges that there were no materials before the Court for effective discussion; that there was not any discussion or any inquiry. What amount of discussion there was, what materials were before the Court, what inquiry was made, or how far the Court or the parties may have had in their own knowledge such information as to the title of land in the parish as to make inquiry unnecessary, we cannot tell; but I cannot imagine anything more unsafe than to attempt to cut down the effect of judgments or interlocutors, distinct and absolute upon the face of them, on a surmise that the case was imperfectly considered, or that the Court had not proper materials for a judgment. Especially does it appear to me unsafe to enter on such speculations after the lapse of nearly a century, when every source of information, except what is written in the interlocutors themselves, has been dried up by lapse of time.

My Lords, I am therefore of opinion that the plea of *res judicata* ought to have been sustained, and the reclaiming note for the Appellant allowed, and that the Appellant, as objector, should have his costs in the Court of Session and in this House.

H. L. (Sc.) 1880 DUNDAS v. WADDELL.

LORD HATHERLEY :—

My Lords, it appears to me that this case turns entirely upon what was before the Court at the time when the augmentation was decreed ; and what is the effect to be given to the great lapse of time which has occurred since. If any doubt existed, and I cannot say that I think a doubt can reasonably be said to exist, upon the only two questions which arise upon the proceedings, namely, whether or not all the proper parties were before the Court, and whether the proper time had arrived for deciding the point, we should have to consider how far the lapse of time ought or ought not to have the effect of shutting the door now to any further inquiry in a case which appears to have been decided in the presence of all the parties interested in having a decision arrived at.

A process of augmentation, modification, and locality seems according to the ordinary course of proceeding to have been divided naturally into two parts. The augmentation and modification took place more frequently at one time, and the locality, especially the final locality, took place at another time when it had been ascertained that there ought to be an augmentation (that is to say, that there ought to be an increase of the stipend of the minister), and a modification. The augmentation having settled the fact that there was to be some increase, and the amount of that increase being settled by the modification, then came the third process, namely, that of locality. Its proper order was at that time. When the Court had decided upon the augmentation, and when the Court had decided upon the amount of the modification, then the Court also decided upon the question who was to bear the burden. That was undoubtedly the usual course.

My Lords, all the learned Judges agree in this, that there can be no question that the facts were before the Court in 1795. Whether they were considered or not is a question which has given rise to considerable difference of opinion amongst the learned Judges in *Scotland*. But you have in the first instance what is called "the minister's rental" brought in, that is to say, his statement when he makes his first application for an augmentation, and you have an order intervening before the final locality, when they came to localise the payments amongst the different heritors.

You have before the Court the fact that the minister had brought in a rental in which he had stated the rental of the parish, and that the heritors had brought in their rental also in which the claim of the predecessor of the Appellant in this case (Mr. *Dundas*) to exemption under titles *cum decimis inclusis* was stated; and that was done in the presence of the minister. There is no question of all the parties having been summoned; there is no question of all the parties having attended the various proceedings upon the process of augmentation and locality; there is no question that, they having been all present, an order was made (I will not say how or upon what consideration) which directed the striking out of these lands of *Arniston*, as being subject to such a grant as was set up by a joint representation of, I may say, all the parties concerned, for nobody seems to have raised a dispute about it. All the parties concerned having made that representation, the course taken was the liberating of these particular lands from the rental.

Now I apprehend that in no litigation whatever, in order to justify a plea of *res judicata*, is it necessary to prove that the case was fully entered into and discussed, either by oral or by written testimony, where no question was raised, but where all the persons interested declared themselves satisfied on the point. The parties may not have been at one particular time all interested together, that is to say, as having an immediate interest. The heritors no doubt were most interested in the question of locality, and therefore were, naturally, not so much interested until that question arose, and that question of locality is usually the last part of the process. But at any stage of the proceedings when you are ascertaining whether there shall be augmentation and modification, or when you are in the ultimate stage of the proceedings ascertaining what locality there shall be, if all the parties for the sake of saving expense, in a matter with which they must have been much better acquainted in the year 1795 than either the Judges or any other persons could possibly be at that moment before the final inquiry was made, if, I say, all the persons interested in the inquiry say (and that is the effect of such proceeding as took place in this case) that they are satisfied and convinced, and that they know as a fact that these lands

H. L. (Sc.) 1880 DUNDAS v. WADDELL. Lord Hatherley.

are exempt and have been conveyed *cum decimis inclusis*, and if a decision is given by the Court directing them to be struck out on that account, it appears to me to be too late now, eighty-five years after that order was made in the presence of all the parties interested, and when that order has been acquiesced in from that time downwards, to raise any question of irregularity in this proceeding which is not apparent upon the face of the transaction.

Now, my Lords, the case has not been brought up to that point. As my noble and learned friend the Lord Chancellor has observed, not a single one of the learned Judges who took the opposite view to that which I have now taken, and which has already been taken by my noble and learned friend who preceded me, has said that the process is irregular on that account. When I say "irregular" I mean irregular in the sense of avoiding the proceedings. Of course, if a case is decided in the absence of one of the principal parties interested, which has happened in more than one teind case that has come before this House since I have sat in it, that is an irregularity which, being apparent upon the face of the proceedings, would be fatal. The ground would be that it would be shewn that a decision was come to in the absence of a party who ought to have been present. But when you have the fact that all the parties were present, it is not necessary that the course of proceedings should be the usual course. The ordinary course (as is shewn by the text-books which were cited in the course of the argument and as to which I apprehend there is no doubt) is to have first an augmentation and then a modification, or, if those two processes be taken together, to have an augmentation and a modification together, and to postpone the locality, which may be the occasion of serious contest between the heritors, until you have settled that the augmentation shall take place, and until you have settled by the modification what the amount of that augmentation shall be. Until you have done that any further expense would be idle; therefore the common and usual course is to postpone the locality until the last moment. But not one of the learned Judges says that that must be done, nor do the text-books say that that must be done, and that unless it be rigorously done the process is vitiated.

I see no principle upon which it ought to be vitiated. I see no reason why the persons interested should not say, We do not

want a long litigation about this, we do not want this question postponed; because as to the lands of *Arniston* we all know what the facts are, and therefore we will take a decision of the Court at once to strike them out. I do not see that any one of the learned Judges, who took the opposite view to that which I take, says that it is a necessary consequence of the course which was taken in this case that the proceeding was vitiated. It seems to have been settled at an early stage of the proceedings, in the presence of all the parties, that the question was ripe for decision, and I think we have no right to presume any inattention (as one of the learned Judges, I think, seems to do) or want of proper attention to the circumstances of the case, which ought to have preceded a regular decision to that effect. So far from presuming that, we ought to presume the contrary, where everything admits of the presumption, where everything is in favour of the presumption, and where it is consistent with the document before us. It seems to me to be perfectly consistent with all that appears, that this question may have been as fully considered as any other case; beyond this, that nobody would ever think of invoking the aid of a Court of Justice to determine adversely that which everybody was prepared at the earliest possible opportunity to concede, from their own knowledge of the state of facts. If everybody was so convinced, the liberating one party from the proceeding was a general benefit to all, though of course, if they were not so convinced, the case might arise of some mishap in the administration of justice.

But how can it ever be said that that which was decided in the year 1795 (decided at all events by a decretal order being made that they were to strike out these eighty-one acres) is now after this long interval of time (eighty-five years) to be set aside, in consequence of its being presumed that there had not been a full and fair consideration of the case? That appears to me to be very difficult to reconcile with the authorities on the effect of trials which have been decided in this House, some of them upon this very matter of teinds. This does not at all amount to saying that there can be any exemption from teinds or the like by a lapse of time; that of course has not been held. It is simply a case where a decision come to at an earlier stage of the proceedings than is

H. L. (Sc.) 1880 DUNDAS v. WADDELL. Lord Hatherley.

usual or ordinary, but at the same time with all the requisites of justice, namely, the presence of all the parties interested, statements made upon the records, with which all those parties interested agree and an order which they submit to. There can be no rule of jurisprudence whatever that can compel proceedings of a hostile character to be taken, where everybody is willing to have the matter determined upon their own knowledge of what are the real facts and circumstances of the case, which we cannot tell now at this distance of time (and that is the value of the element of time in assisting us to a conclusion). We cannot now tell what induced that departure from the ordinary course of proceedings. But, unless authority was cited to me to shew that that was absolutely a fault which vitiated the whole proceedings, I should be extremely slow, and I think your Lordships would be extremely slow also, to hold that the mere circumstances of the order, although it was made in everybody's presence, being made some months, or it might be years, before the final order in the locality, could vitiate the proceedings which had taken place. No such authority has been adduced at your Lordships' bar, and no such authority is cited by the learned Judges who took a different view from that which I am now expressing.

I think therefore, my Lords, that the course proposed to your Lordships by my noble and learned friend the Lord Chancellor is the course which your Lordships are compelled to adopt in the decision of this case.

LORD O'HAGAN :—

My Lords, I am of the same opinion, and substantially for the same reasons. Any anxiety which I have felt about this case has arisen from the rather remarkable balance of opinion amongst the learned Judges in the Courts below who have been divided four against three. If it had not been so, and if the learned Judges had been, either by a large majority or unanimously, of one opinion or the other, I should have been exceedingly slow to differ from them. The law of teinds in *Scotland* is not familiar to us; and the practice with regard to it is very peculiar. With both, the learned Judges must have been thoroughly acquainted, and great deference ought to be paid to their opinions.

But as those opinions differ so widely we must do the best we can to decide between them; and, after good a deal of hesitation and difficulty, and a full consideration of the judgments delivered in the Court below, I have come to the same conclusion at which my noble and learned friends have arrived.

My Lords, we have here, I think, almost every element which in an ordinary civil case would be necessary to establish *res judicata*, and I am not aware that a teind case differs in that respect from any other, or that the same principles may not be legitimately applied to both. We have, first, a meeting of all the persons really interested in the matter. The minister on the one side and the heritors on the other. We have these people formally convened, and we have their proceedings formally conducted, every opportunity given to all the parties to make their respective cases, and those cases they manifestly did make, with, apparently, very competent legal assistance. It does not seem to have been controverted, either by the learned counsel, or the learned Judges in the Courts below, that the tribunal was perfectly competent to decide the issue raised, which was whether the lands of *Arniston* were or were not liable to teind because of the title being *cum decimis inclusis?* Then before a tribunal admittedly competent, we have a distinct issue knit between the parties, with the assent of both of them in these plain words:—"For *Dundas* of *Arniston* and the other heritors, represented that the following lands, viz., the lands and town of *Arniston* called the mains of *Arniston*, those four-score and one acres of the lands of *Shank*, part of the mains of *Arniston*, and the lands called the park of *Halkerston*, all lying in the said parish, were holden by *Dundas* of *Arniston*, *cum decimis inclusis*, and therefore *craved* that these lands might be struck out of the rental." It is impossible that the point in dispute could have been put more clearly. Mr. *Dundas* demands that the eighty-one acres shall be struck out of the rental, and this because, and only because, they were lands held *cum decimis inclusis*.

We have next to consider whether, that issue being so knit between all the persons affected by and free to assert their respective rights, there was a final adjudication upon it. An adjudication was made, in fact, exactly in the terms of the issue: "The Lords ordain the lands and mains of *Arniston*, those fourscore and one

H. L. (Sc.) 1880 DUNDAS v. WADDELL. Lord O'Hagan.

acres of the lands of *Shank*, part of the mains of *Arniston*, and the lands called the park of *Halkerston* to be struck out of the rental," following the very words in which the demand had been made to the Court.

Having thus a clear issue, and an adjudication, what have we further? We have as between all the parties interested a deliberate acting upon that adjudication for a great length of time. The minister according to the law of *Scotland* is, as I understand, in a position to bind his successors. If this was a valid judgment binding the minister when it was made, it binds equally the existing minister.

But there is still more in the case. The same minister who had been acting in the process of 1795, had another teind process in the year 1807. And looking at the pleadings in the second process in 1807, and the case made in it by the minister, it is perfectly manifest that that whole proceeding went on the assumption that an adjudication had been made in 1795, and that it was a valid and final adjudication. That was distinctly conceded, and it seems to me a very strong thing to say, at this distance of time, that an adjudication, so immediately acted upon by those who had an interest in resisting it when all the facts were recent and known to everybody concerned, was really no adjudication at all, either because the Court had not considered the subject of it or had not proper materials on which to found a judgment.

Further, Lord *Mure* informs us, and his statement is not contradicted, that the adjudication, according to the law of *Scotland*, was liable to appeal. It is plain that the minister at that time was alive to his legal rights and ready to assert them. He repeated his processes. He did his best to get as much out of the parish as he could. And it is difficult to conceive that if an adverse decision could have been assailed before an appellate tribunal, he would have allowed it to remain unchallenged, unless on the supposition that there was no real ground to challenge it with a hope of success. And so things have remained, without question, for a period of about seventy years.

Can we disturb a settlement of rights so solemnly established and so long maintained? Can we assume that the competent Court dealing with the plain issue did not apply its judicial mind to a consideration of that issue? Can we regard the suggestion

that according to the custom of the time, the adjudication as to liability to teind did not always precede the ascertainment of its amount? Or can we venture to affirm that adequate materials for adjudication were not available when judgment was pronounced?

These are the suggestions on which the Appellant mainly relied; but they seem to me to admit of satisfactory answers. Whatever may have been the usual or occasional course of proceeding in other cases, in point of fact, an adjudication took place in this. We do not fully know what materials for judgment were before the Court at the end of the last century; but that Court was *ex concessis* competent. It could not have done its duty if it made an adjudication without sufficient investigation of all facts and documents pertinent to the issue before it, and we are bound, I think, to assume that it did its duty and made such inquiries as were needful for the purposes of justice. Can we, at such a distance of time and in default of evidence, presume either an absence of judicial consideration or of grounds for the conclusions to which the Court was led in the case before it? The presumption, I conceive, should be all the other way, and we should act on the principle indicated by Lord *Gifford*, one of the Judges who favour the Respondents, when he says, "It is safe to presume that everything was urged that could be urged, and that all parties were satisfied with the resulting judgment." Manifestly they were so satisfied in this particular case.

Upon the whole, my Lords, though not, I repeat, without difficulty, I concur in the judgment of the Lord Chancellor.

LORD BLACKBURN:—

My Lords, this case was argued at your Lordships' Bar just before the conclusion of last session, and I considered it very carefully during the recess.

The Court of Session in 1795 had before them all the parties concerned; the heritors and the then minister, whose personal interest was only to have an augmentation during his time, but who was also entitled and bound to protect the interests of his successors; and therefore I think that, if the Court of Session did then decide that the eighty-one acres were teind free, this was *res judicata*.

H. L. (Sc.) 1880 DUNDAS v. WADDELL. Lord O'Hagan.

But on the question whether the proceedings in the Court of Session did sufficiently prove that there was a decision, there was a great difference of judicial opinion below. Three elaborate opinions were given on each side; the seventh Judge did not write an opinion of his own.

After reading these six opinions more than once, the state of my mind was that I could not say either side was right, and certainly could not say that either side was wrong. I think if I had had to decide in the first instance, I should have given my judgment against the *res judicata*, on the ground that I could not see that it was made out that there had been a decision on the point. If I had had sitting alone to decide in a Court of Appeal, I should have affirmed the decision below, whichever way it was, on the ground that I could not say it was wrong. This would not have been satisfactory. I am glad that I am not alone and that the noble and learned Lords who heard the argument are able to come to a decision.

I need hardly say that in such a state of mind as I have described I do not dissent from the result to which they have come.

Ordered and adjudged:—That the said interlocutors complained of in the appeal be and the same are hereby reversed; and it is declared that the plea of res judicata ought to have been sustained, and the reclaiming note for the Appellant allowed; and it is ordered that the Appellant as objector do have his costs in the Court of Session; and it is further Ordered that the cause be remitted back to the Court of Session to do therein as shall be just and consistent with this declaration and judgment: And it is also further Ordered that the Respondent do pay to the Appellant the costs incurred by him in respect of the appeal to this House, &c.

Lords' Journals, 27th February, 1880.

Agents for Appellant: *Connell, Hope, & Spens.*
Agent for Respondent: *William Robertson.*

[HOUSE OF LORDS.]

THE LORD ADVOCATE . . . . . APPELLANT; H. L. (Sc.)
LORD LOVAT . . . . . RESPONDENT. 1880
Feb. 28.

Salmon Fishing—Barony Title—Immemorial Possession.

In 1774 the Crown granted to *L.* a barony charter to lands almost continuous on both sides of a river in *Inverness-shire*, included were older baronies containing express grants of salmon fishing to parts of the river some above and some below certain falls, also an ancient barony grant giving the fishing on the *Water of Forne*, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial *L.* had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives, just below the falls, which stretched right across the river, and which were narrower than then allowed by law. Above the falls he asserted his right (*a*) by occasionally fishing there; (*b*) by during the spawning season having watchers; (*c*) by taking his tenants in their leases bound to protect the fishing, and prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net and coble.

Neither the Crown nor anyone else had ever objected to *L.'s* entire possession of the whole salmon fishing in the river. The Crown now, while admitting *L.'s* right to the salmon fishing below the falls to be incontestible, claimed, *de jure coronæ*, all the fishing above the falls:—

Held, affirming the decision of the Court below, that the river here was a *unum quid*—one continuous and connected subject—and that *L.'s* entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits and *ex adverso* his barony lands wherever situated:

Held, also, that this decision was without prejudice to any right of the Crown or its grantees to the salmon fishing *ex adverso* the ancient barony lands of *C.*, which were lands on the banks of the above-mentioned river intermixed with *L.'s* barony lands.

See Lord *Blackburn's* opinion (p. 311) as to the extent of a grant to take fish by yairs or cruives.

APPEAL from the Second Division of the Court of Session in *Scotland.*

This action was one at the instance of the Lord Advocate, the Appellant, on behalf of the Crown, for declarator that the whole salmon fishings in the Rivers *Affaric, Cannich, Glass* (sometimes called the *Beauly*), *Farrar*, &c., from their source down to the Falls of *Kilmorack*, with their tributary rivers, streams, and lochs,

H. L. (Sc.) 1880

LORD ADVOCATE v. LORD LOVAT.

in the parishes of *Kilmorack* and *Kiltarlity, Inverness-shire,* belong to the Crown *jure coronæ.*

The proceedings were instituted not only against the Respondent, Lord *Lovat,* but also against the *Chisholm* and other owners of land on the banks of the above rivers; but all save Lord *Lovat* declined to dispute the right of the Crown in the salmon fishings in question. Lord *Lovat* contended that he was the sole proprietor of the fishings either (1) by express grant, or (2) by virtue of his barony title, explained and interpreted by immemorial possession. It was conceded by the Appellant that Lord *Lovat's* title to the salmon fishings below the Falls of *Kilmorack* was incontestible; but that he had no right whatever to the fishings above the falls.

The course of the river was as follows: It rises in the western part of *Inverness-shire;* and by the time it reaches a place called "*Guisachan*" it is a considerable stream, known by the name of the "*Diag.*" Then, a little above "*Fasnakyle,*" the "*Diag*" is joined by the "*Affaric*" river; and the united streams are then known as the "*Glass.*" A few miles farther down the river receives the "*Cannich,*" and then, after a course of several miles, it receives the "*Farrar,*" which, after flowing past *Struy,* joins the main river at *Erchless Castle,* six miles above the falls and eight above *Beauly Firth.* The river, under the name of the *Glass* or *Beauly,* then passes and forms the island of "*Eilan Aigas,*" below which it receives "*Breackachy Burn,*" and thence proceeds over a rocky bed of about a mile to the Falls of *Kilmorack,* and on to the estuary known as *Beauly Firth.* Lord *Lovat* substantially claims the fishing from *Guisachan* or *Fasnakyle,* points up the river near where the *Diag* is joined by the *Affaric.*

A large number of ancient titles were examined, some extending back to the year 1206; all will be found, as far as material, dealt with in Lord *O'Hagan's* and Lord *Blackburn's* opinions. The material evidence of possession adduced by Lord *Lovat* will also be found in these opinions. It will, therefore, only be necessary to give here a short summary of the facts. Prior to 1571 the owners of the land on both sides of the river, from its source to the sea, were three in number. *Hugh* Lord *Fraser,* of *Lovat,* was, under various titles, proprietor of the whole lands on the south

bank of the river, and also of the lands on the north bank from a place called the *Glass Burn* down to the lands of *Breachachy*, and of the lands of *Kirkton* of *Kilmorack*, opposite the falls. These lands were held under the barony charter dated 1539, by King *James* V., and not only included certain lands *nominatim*, but the previously erected baronies of *Ard*, *Abirtarf*, and *Erchless*, and an old barony of *Lovat*. The barony of *Erchless* included lands above and below the falls, with fishing *cum molendinis piscationibus lie zaris*. It was purchased in 1528 by the *Lovat* of that day, and the Crown charter confirming the conveyance was in identical terms to that erecting the barony.

The *Chisholm* was the proprietor of the lands of *Knockfyn*, *Comarmore*, the two *Inverchanais*, and the two *Breachachys*, all included in the barony of *Comarmore* granted by King *James* V. in 1538. *Breachachy* extended along the north bank above *Breachachy Burn;* and the other lands on the same side were above the *Glass Burn*.

The third proprietor was the priory of *Bewlie* or *Beauly*, and owned all the land on the north bank from the *Breackachy Burn* to *Beauly Firth*, except *Kirkton* of *Kilmorack* with fishing in the *Water of Forne*. The monks claimed in virtue of a composition from one *John Bisset*, who, it was alleged, had at a very early date received a Crown grant of the whole lands on the river from *Lovat* near the sea to *Guisachan* near the source, with fishings.

In 1571 Lord *Lovat* acquired by conveyance from the monks the barony of *Beauly*, with the salmon fishing *super aquā de Forne*, extending "*a lie Carnecott usque ad mare vel als ubilibet in dicta aqua inter salmonū piscarias dicti nobilis dñi hugonis dñi Fraser de Lovatt de Kilmorak, usque ad mare cum lie cruffis et singulis suis proficuis jacen infra prioratū de Bewlie*," &c.; and this charter was confirmed by a charter by King *James* VI. Lord *Lovat* thus possessed a continuous stretch of lands on the south side, bounded by the streams of the *Diag*, the *Glass*, and the *Beauly*, from *Guisachan* to the sea; and on the north side he possessed an equally continuous stretch of river boundary, with the exception of the barony lands of *Comarmore* owned by the *Chisholm*.

In the course of the seventeenth century Lord *Lovat's* predecessor sold to the *Chisholm* the lands of *Easter* and *Wester*

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT.

Erchless, Comerkil, Wester Comar, Buntails, and *Mauld,* lying on the north bank; and the superiority of these lands afterwards fell to the Crown.

In the next century Lord *Lovat's* estates were for a time confiscated; but were restored to the Respondent's ancestor General *Simon Fraser,* in whose favour a charter of novodamus was granted in 1774, which included not only all the lands then owned by Lord *Lovat's* predecessors, but those above-mentioned which had been long parted with to the *Chisholm.*

Since then the lands of *Guisachan* had been sold to Sir *D. C. Marjoribanks,* and the lands of *Aigas* to Mr. *Oswald;* so that at the present day Lord *Lovat* is owner of both banks up to *Breachachy Burn;* of the south bank from that burn to *Easter Mains,* and again *ex adverso* of the *Easter* and *Wester Croichails;* and of *Struy* on the north bank from *Glass Burn* down to opposite *Mauld.*

Under the Crown charter of 1774, which contained as one of its component parts the barony of *Bewlie,* two questions arose in the Court below, though the first was not argued here—(1) as to the precise position of *Carnecot,* the Crown contending it lay below, and Lord *Lovat* that it was above the falls; and (2) as to the extent of the "*Water of Forne.*" It was admitted by both parties that it applied to part of the river, but the Appellant maintained it only applied to the river below the falls; on the other hand, the Respondent said it applied to the whole river from its source to the sea, including all the tributary streams, &c.

Lord *Lovat* founded his express title on, *inter alia,* the words in the charter from the monks (stat. of facts): "All and whole the salmon fishing upon the water of *Forne,* from *Carnecot* to the sea, with the cruives and all other profits thereto belonging lying within the said barony of *Bewlie,* united and incorporated into a free barony called the barony of *Bewlie;*" and contended that the whole streams now known as the *Farrar, Glass, Beauly, Affaric, Deabhaibh,* and *Cannich,* were anciently known as the *Water of Forne*; at least they bore that name from the place anciently called *Carnecot* downwards to the sea; that the situation of the said place is now not precisely known, but such a grant comprehended substantially the whole salmon fishing upon the whole of the said rivers.

And otherwise maintained that all his land having been erected

into a barony, the river and tributaries which were within the lands were a *unum quid*, and, therefore, he having admitted exclusive possession of the fishings of the lower part of the river, was entitled to the fishing of the whole. And, besides, he had in point of fact possessed the fishing of the upper part of the river above *Kilmorack* to an extent to give him the right of salmon fishings, having a barony title.

The Appellant contended that Lord *Lovat* could point to no grant of salmon fishing prior to 1571, above the Falls of *Kilmorack*, and that therefore the Crown Charter of 1774, which gave him nothing more than he had before the forfeiture of the estates, gave him no express grant; that though Lord *Lovat* had full and complete possession of the salmon fishings below the falls, that possession was ascribed to the express grants which he there had, and not to the barony title; and that, therefore, such fishing was quite insufficient to create a right of fishing above the falls. That the only way in which Lord *Lovat* could establish his right there, was by proving he had fished above the falls in an appropriate manner for a prescriptive period; which the Crown maintained he had not done.

The material part of the evidence of possession was, that Lord *Lovat's* ancestors had from time immemorial had the full benefit of all the fishing in the whole river, exercising their right by cruives placed just below the falls, and which stretched right across the river, and which were narrower in their hecks than allowed by law. Thus by means of the cruives and the falls—over which the fish could not get, except in flood—the Lords *Lovats* reaped the full crop of the fish. Close cruives were abolished by law in 1862, and since that period it was proved that Lord *Lovat* had fished by net and coble once a year on the upper parts of the river. For the prescriptive period also, watchers had been sent up the river in the spawning season; and during the open season Lord *Lovat's* gamekeepers were ordered to prevent people fishing. The only person who was proved to have fished was the *Chisholm* by rod and line, and he was not prevented at first, as being a near neighbour: but when he attempted to fish adversely, and of right, his factor was arrested, and paid a fine to stop legal proceedings. Lord *Lovat* also produced a number of agricultural

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT.

leases of land on the upper portions of the river, extending from the year 1802, in which the tenants were taken bound to prevent all others from taking salmon, and not to take it themselves, and to allow the landing of Lord *Lovat's* nets. No evidence was brought by the Crown of any objection ever being made by the Crown or any upper proprietor as to Lord *Lovat's* taking all the yield of salmon.

The Lord Ordinary (1) pronounced an interlocutor decreeing against Lord *Lovat* in terms of the conclusions of the summons; but on a reclaiming note the Court of Session recalled this interlocutor, except so far as the rivers *Affaric* and *Cannish* were concerned; and pronounced an interlocutor, the 7th of March, 1879, in favour of Lord *Lovat* (2). Hence the present appeal.

On appeal,

1879. Nov. 18, 19, 24, 25, 26. The *Lord Advocate* (Right Hon. *W. Watson*), the *Dean of Faculty* (Dr. *Fraser*), with them Mr. *Pearson*, contended for the Appellant that there was nothing to shew what the *Bissets* held or what they gave to the monks; nor was there the slightest evidence that they ever possessed the whole of the land of which the fishing was now claimed. But on the face of the title from the monks to *Lovat* the express grant was limited to the priory of *Bewlie*, and to the fishings inter or between or mixed with Lord *Lovat's* of *Kilmorack*, and were therefore below the falls between *Kilmorack* and the sea. If *Carnecot* be placed below the falls, and therefore within the limits of the Barony of *Bewlie*, the deed of the monks could be properly interpreted; but if above, as claimed by Respondent, then the deed would be unintelligible, for the monks' fishing would not then be between those of the Lord *Lovat* of that day, he having only express grants of fishing below the falls. In fact, the *Lovats* had an express grant of all the fishings below the falls; but that could not form the basis of prescribing for other fishings somewhere else.

The interlocutor of the Court below was too wide in its terms, for it not only gave the Respondent the fishing *ex adverso* his own barony lands; but also *ex adverso* the old barony lands of *Comarmore*, including *Breachachy*,—the property of the *Chisholms*, which

(1) Lord *Curriehill*. (2) See p. 298; also 16 Scot. Law Rep. 18.

never at any time belonged to Lord *Lovat* or his predecessors,—and gave them also *ex adverso* the lands of *Erchless* and *Mauld*, &c., which the Respondent's ancestor had more than two centuries ago sold to the *Chisholm;* the superiority of which lands had since 1774 fallen to the Crown, therefore the Respondent had no title to these lands capable of forming even a basis of prescription. At all events, by possession the *Lovats* could not have got the right to the fishing *ex adverso* the lands of the barony of *Comarmore*, for a barony bounded by a stream, includes only half the stream: see *Stuart* v. *M'Barnet* (1). And in this respect the interlocutor must be altered.

They further contended that possession above the falls had not been proved, the leases only applied to rod fishing, and that could not extend the right where net and coble were available; then watching could not be said to be contrary possession; fishing by net and coble once a-year had only been since 1862; and the possession below could not be extended to the upper river, the possession below being attributable to express grants.

[They also cited *Town of Perth* v. *Gray* (2); *Lord Advocate* v. *Cathcart* (3); *Lord Advocate and Another* v. *Lord Blantyre* (4); *Stewart* on Salmon Fishing, p. 69; *Town of Dumbarton* v. *Graham* (5).]

Mr. *Benjamin*, Q.C., and Mr. *Balfour*, for the Respondent, admitted that, in a litigation with the Crown, it devolved upon the subject to shew that he holds the fishings claimed by him upon a title flowing mediately or immediately from the Crown; but they contended that here the presumption on which the Crown was entitled to found is removed, and there was antecedent probability in favour of the Respondent's possession of the titles he maintained he had, because (1) at one time the Crown was divested of these fishings, and there was no evidence it ever received them back; (2) the Crown admitted the Respondent had a right to the much more valuable part of the stream, viz., the lower, there was therefore

(1) Court Sess. Cas. 3rd Series, vol. vi. (H. L.) p. 123.

(2) Morr. Dict. 12,792, reversed, 1 Pat. App. Cas. 645.

(3) Court Sess. Cas. 3rd Series, vol. ix. p. 744–9.

(4) 4 App. Cas. 791.

(5) 16th of Jan. 1813, Fac. Coll. p. 59; aff. 6 Pat. App. 163.

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT.

an antecedent improbability that it, when originally giving off the unbroken stretch of land, would reserve to itself the less valuable fishing on the upper part, which formed one continuous estate with the more valuable ones below; (3) the Respondent had in the barony title comprehending the whole lands—at least on one side—a sufficient title for prescription; and he had from time immemorial asserted and exercised the right of salmon fishing without challenge; (4) There had been no attempt by the Crown or by any one else seriously to exercise the right.

The express grants in favour of the Respondent were two: the conveyance from the monks of *Bewlie* giving, and by special language attributing, all the fishing "*aqua de Forne*," dated 1571, confirmed by the Crown; and the royal charter of the barony of *Erchless* with fishing by "*zaris*," dated 1528; and the further title of immemorial possession coupled with the barony charter of *Lovat*, which contained the express grants as component parts.

The root of the Respondent's title was that the main river was anciently called *aqua de Forne*. The monks obtained the fishing *aqua de Forne* from *John Bisset*, and from a composition dated 1224, and a Papal Bull dated 1231, the inference was that *Bisset* had received from the Crown a grant of all the lands, and of the whole fishing on the river called the water of *Forne*, that is, from *Guisachan* to the sea. The barony of *Erchless* contained lands having express grants both above and below the falls. Then the barony of *Lovat* united the various groups of possessions, thus giving not only a grant connected with land, but also a grant of fishing on the whole river, unconnected with land and possession.

It was said that the rights below the falls were attributable to express grants on that part of the river, but the Respondent obtaining subsequently a barony title embracing the subjects of the previous grants and possession continuing, he was entitled, if he chose, to ascribe his possession throughout to the barony title; for being proprietor under double titles he was entitled to choose the title most favourable to his case: *Erskine*, 2, 1, 30.

At all events, it being admitted they had complete possession below the falls such possession—the river being a *unum quid* by natural continuity and by the union of all the parcels of land under a barony title—was equivalent in law to possession of the

whole river, possession of a part of a barony being possession of the whole: *Erskine* 2, 6, 18. They further maintained that the Respondent had for centuries taken the whole fish in the river by cruives, and had always claimed the whole fishing; asserting their ownership by every possible way, even taking their tenants on the upper portion bound to protect the fishing, to permit the lessor's access to the river and not to fish themselves. The Crown itself, in 1757, was of opinion that all the fishing belonged to Lord *Lovat*, for at that date it leased out the fishing of Lord *Lovat's* as running far above the falls.

The point now argued by the Appellant was that the Court below erred in not excepting from their interlocutor the lands of the barony of *Comarmore*, and the lands sold off by Lord *Lovat*. As to the fishing *ex adverso* the barony of *Comarmore*, the barony of *Lovat* included and had allotted to it the fishing from shore to shore of the whole river; therefore *Comarmore* was erected without fishing, and the charter of that barony supported this view, and the *Chisholm* never had any possession of the fishing. Then as to the lands feued out, the fishing *ex adverso* of these remained untouched in the possession of Lord *Lovat*.

[They cited *Lord Advocate* v. *Sinclair* (1); *Lord Advocate* v. *McCulloch* (2); *Stair*, 2, 3, 70.]

The *Dean of Faculty* in reply.

The Law Peers, having considered their judgment, delivered the following opinions:—

Feb. 28, 1880. EARL CAIRNS, L.C.:—

My Lords, in this case, arising upon a claim by the Crown to the salmon fishings of the River *Glass* or *Beauly*, in *Inverness-shire*, the Lord Ordinary decided in favour of the Lord Advocate; but the Judges of the Second Division of the Court of Session decided in favour of the Respondent, Lord *Lovat*.

After hearing the very elaborate and able arguments at your Lordships' Bar, I was of opinion, and that opinion has been confirmed on a careful examination of the documents and evidence,

(1) Court Sess. Cas. 3rd Series, vol. v. (H. L.) 105.

(2) Court Sess. Cas. 4th Series, vol. ii. p. 27.

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Earl Cairns, L.C.

that the decision of the Court of Session was right and ought to be affirmed. I find that my noble and learned friend, Lord *Blackburn*, has, in some observations which I have had the advantage of reading, so fully expressed the conclusions which I draw from the papers that I do not propose to go over ground which your Lordships will find, when you hear those observations, has been completely occupied. I will only say that in moving, as I am prepared to do, that the interlocutor of the Court of Session of the 7th of March, 1879, be affirmed, I think that the interlocutor should be qualified so as not to prejudice one aspect of the case, which I do not think it was meant to touch. I propose that after the words "*quoad ultra* sustain the defences," there should be inserted these words, "without prejudice however to any right of the Crown or its grantees to the salmon fishing *ex adverso* the lands of the antient barony of *Comarmore*," which includes the lands of *Breackachy*. My Lords, I do not think this variation, which I have no doubt the Court of Session would have made in the form of the interlocutor if it had been asked, ought to exempt the Appellant from payment of the costs of the appeal, and I shall move accordingly.

LORD O'HAGAN:—

My Lords, this case is of great interest and in one, at least, of the aspects in which it has been presented, of great difficulty.

The contest is exclusively between the Lord Advocate, representing the Crown, and Lord *Lovat*.

The proceedings were instituted not only against the Respondent but also against the *Chisholm*, Mr. *Gordon*, and Sir *Dudley Coutts Majoribanks*, who have declined to dispute the right of the Crown to the salmon-fishings in question, and submitted to a decree in its favour. Lord *Lovat* maintains an adverse right, insisting that, either by express grant or by continuous possession for a sufficient period in connection with his barony title, he has those fishings vested in him as their sole proprietor.

The Lord Ordinary decided against the Respondent's claim. The Judges of the Second Division of the Court of Session decided in his favour. And this House is now to determine between the conflicting views which have been discussed, as well in the judg-

ments of the Courts below as in the arguments at your Lordships' Bar, with singular care, astuteness and research.

It does not appear that, from the beginning of the 13th century until the present time, any assertion of right to the fishings of the river *Beauly*, as against the *Lovat* family, was ever made by any person, save in a single instance, when, after a legal controversy, judgment was given in their favour; and there is no pretence for saying that, at present, any individual dreams of making such an assertion or has any claim to make it.

The titles are, in some respects, imperfect. They come down from the year 1206, and although—notwithstanding the lapse of centuries, the effects of civil commotion, the destruction of documentary evidence, and the changes of possession—they deduce the descent of his estates to Lord *Lovat* from his predecessors with remarkable precision, they are necessarily affected by these things with some obscurity and incompleteness, which render many of the questions raised before us almost, if not altogether, insoluble.

But this, I think, may be confidently said, that, in all its dealings with the property with which those titles are concerned, there is clear indication that the Crown had given up, at some long past period, its interest in the salmon fishings which it now seeks to recover, and that there is no ground for alleging that that interest was ever re-conveyed, either by the *Bissets*, or the monks, or the *Lovats*, or anyone else, or that it ever was re-invested by any act of which we have any record. There may be insuperable difficulties of detail as to some of the transactions which are proved to have occurred and some of the expressions which are used in ancient documents, but the impression left by the entire proof is, in my mind, irresistible, that the fishings of the *Forne* passed from the Sovereign and, so far as those proofs instruct us, have never returned to him.

It is, if possible, still clearer that, for some 700 years, no claim was made to those fishings by the Crown. They were the subjects of family arrangements and charters and royal confirmations; there were changes in the proprietorship of them from time to time; but there is no proof that, in any way, those who represented the Crown or any one professing to derive under it ever for many generations made a claim or did an act inconsistent with

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

the title of the *Lovats*. And in latter days, whilst unquestionably, for at least a hundred years, that title was more or less openly and continuously asserted, so as to create, according to the evidence, a universal belief in the district that it was uncontested and unassailable, the Crown never made the demand which it makes now.

Of the legal effect of the acts of possession on which Lord *Lovat* relies I shall speak fully hereafter; but there seems to be no doubt that by fishing, and watching, and in other ways, he and those who went before him dealt with the fisheries as their own; and that after the removal of the cruives, in 1862, he formally and ostentatiously made an annual assertion of his right, and so emphatically called to it the attention of all whom it might concern. Yet the Crown never awoke from its inaction or interfered with his proceedings or denied his claim or set forward its own. What may have roused it to attempt the disturbance of an enjoyment which so many centuries had established, apparently as of absolute right, and referable reasonably only to a legal title, consecrated by time and passively admitted by those whose duty should have required them to challenge it if it was insufficient—we do not know and need not inquire. But such a state of things and such a course of conduct warranted the declaration of one of the learned Judges of the Court of Session, the Lord Justice Clerk, that "this is not a favourable case on the part of the Pursuer;" and I think that the Defender has had reason to complain of "the lapse of time and the loss of evidence" to which another of the learned Judges made reference, as rendering it impossible to act on his titles alone, "without invoking the aid of surmise and conjecture to an extent which is scarcely admissible." For that lapse of time and loss of evidence he is not, certainly, responsible. He might fairly rely on the practical admission of his right: and the obscurity which clouds it, if tested only by the ancient grants, has not arisen from any default of his. The evidence of witnesses, competent to settle the position of localities or to illustrate facts by the light of authentic tradition, may have been lost for ever, and documents may have been destroyed which might have enabled us undoubtingly to construe those remaining—but rendered, in their absence, equivocal or unintelligible. If

presumption were to be made, under such circumstances, one way or the other, it would not seem reasonable to press it in aid of the delay and acquiescence which have taken from us the means of reaching a satisfactory ascertainment of the truth.

But it appears to be the admitted law of *Scotland*, that the Crown is to be assumed to be entitled to all salmon fishings to which the vassal cannot affirmatively establish his claim. The Respondent's counsel have not disputed that this is the law, and, accepting the obligation which it casts upon them, have sought to shew Lord *Lovat's* right to defend his possession of the fishings on two separate grounds, either of which would suffice for the purpose. They do not rest on any presumption in his favour as reversing or overbearing that on which the Crown has warrant for relying, and they use its passive allowance of possession of the fishings for such a length of time, not as creating any title in Lord *Lovat* or estopping the Lord Advocate from legitimately controverting any title alleged by him, but as sustaining their substantive case, and leading to the conclusion they deduce from the facts and documents in proof. They insist that Lord *Lovat* has shewn good title to the fishings, founded on express grants or on grants explained and interpreted by possession.

It has been contended with great ability that Lord *Lovat* can sufficiently sustain his right to the entire salmon fishing of the River *Beauly*, from the source to the sea, by virtue of his titles. As Mr. *Benjamin* put it, he claims under them not only his lands but an independent right of fishing, without any reference to possession, and the question becomes one largely dependent for its solution on the construction of ancient deeds. But although the view so urged upon the House has, undoubtedly, the countenance of some of the learned Judges of the Court of Session, I prefer to avoid the complicated and embarrassing considerations which it involves, and to rest my opinion on the simpler and surer ground of the operation of a barony title, sufficient for prescription with possession under it. If that title and possession did not exist I should find it difficult, having listened carefully to the arguments upon them, to speak with full confidence as to the effect of the express grants alone.

The Respondent principally relies on the Royal Charter of

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

March, 1528, the charter by King *James* erecting the barony of *Lovat* of the 26th March, 1539, and the conveyance by the monks of *Beaulieu* in 1571, which received confirmation by the Crown, eight years afterwards, and was ratified by Parliament in 1584. These are connected by reference and description with each other, and, in the same way, with the prior grant to *John Bisset* who conveyed to the monks of *Beaulieu*, and the subsequent Charter of Novodamus of 1774, which recites the royal purpose to restore the property possessed by Lord *Lovat* before his attainder. The grant to *Bisset* exists no longer, and we have no means of ascertaining its precise terms.* But it does not seem to be controverted that the monks took from him;—and what he gave, "*intentu pietatis*," included, as appears from the Papal bull of 1231, amongst other possessions, "*piscaria de Forne.*" It seems to me that the charters of 1528 and 1539 and the conveyance of 1571 indicate, at once and very strongly, the abandonment by the Crown of its right to the fisheries, at an antecedent period, and the largeness of the interest with which the charters and conveyances were meant to deal. The bull is evidence that the Prior of *Beaulieu* had the property in the "*piscaria de Forne;*" and the charter combining two estates in the barony of *Erchless* describes the first as containing certain lands "*cum piscacionibus earundem in aquâ de Forne*," and the second as containing other lands "*cum piscacionibus*," while the whole of those lands are constituted a barony "*cum molendinis, piscacionibus le zaris*," &c. It is the common case, that "*zaris*" points to salmon fishing by cruives or yairs. So much for the charters of 1528 and 1539.

When we come to consider the subsequent conveyance from the monks, who had all the "*piscaria de Forne*," which *Bisset* previously enjoyed, we find it granting "*omnes et singulas* piscarias nostras salmonum piscium . . . *ad et super aquam de Forne extendent a lie Carnecott usque ad mare vel als ubilibet*," &c. And the Charter of Novodamus of 1774, framed to give back all their forfeited estates to the *Lovat* family, follows closely the conveyance and grants "totas et integras salmonum piscationes *super aquam de Forne a Cairncross usque ad mare jacen infra dict baroniam de Beulieu.*"

I do not go further into these documents, as I do not mean to

found my opinion chiefly upon them; but I am bound to say that they seem to me to make a persuasive case in favour of the Respondent on the first branch of his contention. Whatever was the "*Forne*," in ancient days, there is ground for concluding that, throughout its entire course, *Bisset*, the monks, and the Lords of *Lovat* were successively owners of the salmon fishings, the right to which the Crown had given to the subject; and whatever may have been the terms of the lost grant to *Bisset*, it was expressly recognised as continuing in force by solemn charters specifically shewing what had been originally bestowed.

Under these circumstances, and with these impressions, I should have been slow to disturb a possession so long continued, with the apparent assent of the Crown, by reason of any obscurity created in the title through loss of documents and failure of oral testimony, even if, on the second branch of the case, I had not satisfied myself that Lord *Lovat* has successfully met the challenge of the Pursuer, and established a clear legal right to continue that immemorial possession.

I am glad that the House is relieved from any necessity of proceeding upon grounds of a dubious or equivocal character. Probably, no one who has heard the argument can fail to have difficulty in reaching a clear ascertainment of the extent of the "*Aqua de Forne;*" and the course of the river which that name was meant to designate. A similar difficulty undoubtedly applies to the interpretation of the words "*de Kilmorack*" in some of the ancient documents, and it is not easy to determine whether they were intended to point to a territorial title or to designate and describe, topographically, a particular locality. The position of *Caincross* or *Carnecott*, which was the subject of such elaborate inquiry and discussion in the Courts below, seems to have become more undiscoverable in proportion to the amount of evidence and the affluence of reasoning which were applied to define it, on the one side and the other, until at last the quest after it has been abandoned in despair, and your Lordships have been relieved of any trouble about it. Then, we have had a great deal of curious argument as to the translation of certain passages of the Latin in which the charters and conveyances are couched; and when it has not been found quite intelligible *per se*, we have been asked

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

to seek assistance from comparison of one document with another, and from rude translations into the phraseology of the Scottish Parliament,—sometimes illustrative of the process "*obscurum per obscurius.*" On these matters and others, after they have received the fullest possible elucidation, more or less of doubt may fairly be entertained; and whilst I am disposed to agree with the Lord Justice Clerk that "if I were to draw an inference of fact and law from the older titles, I could not assent that the Crown had made out their right;" I would be obliged to decline the admission of it, with doubt and hesitation.

In this state of things, my Lords, I turn to the second ground on which the Respondent defends his title to the fishings; and in my judgment it is clear and satisfactory. The possessor of a habile title to a barony is warranted in prescribing a right of fishing; and without reference to the older titles, under which I agree with the Judges of the Court of Session, the Lords of *Lovat* had such a warrant to prescribe, it is not denied that, under the Charter of Novadamus of 1774, a habile title was created which, if accompanied by fit possession for a sufficient period, gave an indisputable claim to the fisheries in question. This disembarrasses the case of the many debateable considerations with which it has been overladen, and reduces our inquiry to the single point,—whether an adequate possession has been sufficiently established for a sufficient length of time?

As to time, more than a hundred years have passed since the Charter of 1774 was granted, and it is therefore abundant to admit of the establishment of a prescription.

As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession. The dealing with a river, requiring activity and vigilance for the realization of profit from its fisheries, may fail to give reliable evidence of this,

which might be satisfactory if the stream were unproductive and incapable of compensating for larger effort and expenditure.

Again, in a case like the present, it is not necessary, for the purpose of proving possession of a fishery, that the claimant of a baronial title should shew the exercise of his right in every portion of the river capable of yielding fish. I adopt the opinion of the Lord Ordinary on this point: "I do not," he says, "mean to express or indicate any opinion to the effect that where a right to fish salmon depends on a barony title followed by possession, it is necessary that the party pleading prescription should prove that he has regularly fished in the proper manner every part and stream in the river in which a salmon might be expected to be caught. It would be enough, in my opinion, were it proved that he substantially fished over the whole of the river within his bounds in the appropriate manner, and regularly and continually within the year throughout the prescriptive period. I would be slow to hold that if he fished certain parts regularly and others only occasionally, or not at all, he had failed to establish a right to fish in the whole." I differ from the Lord Ordinary as to the conclusion to which he arrived: but it seems to me that these reasonable and just observations have material value when we come to consider the evidence of the acts on which the Respondent relies.

I shall only make one other remark before I come briefly to summarize that evidence. If possession has not been established by Lord *Lovat*, it is not even alleged to have been in anybody else. The fishings above the *Falls of Kilmorack* are, no doubt, less valuable than those below them; but they are not valueless. The long and laborious and costly controversy which this House is now to terminate has not been waged by the Crown for nothing; and it seems to me of great significance that, if the Respondent's proof of possession fails, there is no proof whatever tendered or suggested that, for the many centuries since *Bisset* received his grant, any such possession has been ever enjoyed save by him and those deriving under him. And if, since the *Lovats* got the barony title, they have not had possession, there is no pretence for saying that it was held, in fact and action, by the Crown or any landowner of the district. The failure of the one attempt by the

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

Chisholm to make out an adverse title only gives force to the statement of this suggestive fact.

Upon the evidence, I think that the Respondent's proof of possession is persuasive and satisfactory. Lord *Lovat's* right to the fishings below the falls is not disputed. He and his successors have admittedly exercised that right since the year 1774, just as they had exercised it for many previous generations. The river *Beauly*, whatever was its ancient designation, is a continuous river. It is properly described, in language which this case has made familiar to us, as *unum quid*, a single entity. It is not broken into two by the *Falls of Kilmorack*, or divided in any other way. And upon the authorities, and the reason of the thing, I am of opinion that possession of a part of it was possession of the whole.

The case of *The Lord Advocate* v. *Cathcart* (1), on which the counsel for the Crown have relied, is, on this point, adverse to their contention. We have here what was wanting there, the "*unum quid*"—the "one continuous and connected subject," with reference to which "possession of a part" is possession of the whole. It is said by a great authority in the law of *Scotland* (2) that "possession of any part of a barony is reputed possession of the whole, and preserves to the baron his possession as entire as if it had been total," and this on the ground that the barony is "*unum quid*, one individual right." So a river, which is within the bounds of a barony and is "one thing," from its source to its outflow, is possessed in the whole if it is possessed in any portion, unless there be, as there may be, dealings with it by conveyance or testament, or otherwise, creating a several proprietorship in various divisions of it. I agree with Lord *Gifford*, that "(in certain circumstances) possession of a part of the barony will not be equivalent to the possession of the other part." But in this case there is no allegation that such special circumstances exist, and the rule applies to the river in its unbroken integrity.

In answer, the counsel for the Crown contend, as to the fishing below the falls, that the Respondent's right to its enjoyment was referable "to express grants of salmon fishings or of *piscationes* in particular lands on that part of the river," and that, therefore, the practice of fishing there is insufficient to imply a right in the

(1) Court Sess. Cas. 3rd Series, vol. ix. p. 744. (2) Erskine, ii., 6, 18.

waters above. I do not go into the controversy in this regard as to the effect of the ancient titles, and the absorption of them by the barony title. There seems ample authority for holding that, in *Scotland,* if a man has two sets of titles he may ascribe his possession to one or to the other, according to his interest or his choice. If the Charter of 1774 had alone grounded the claim of Lord *Lovat* to prescribe for the right of fishing in the entire river, by reason of his undeniable possession below the falls, there would have been no pretence for such an answer to it; and I do not think that anterior grants, giving a cumulative interest, can have diminished its validity.

But the case of the Respondent does not rest on mere constructive possession, or on the operation of any rule of law. He and his ancestors had, for a time far beyond the period of prescription, the control of the salmon fishings of the whole stream, and the enjoyment of all the profit which they yielded, and therefore, effectively, the possession of them all. The fishings below the falls were the valuable fishings. Those above were not valueless, but comparatively so. The case of the Respondent is that, as owner of both, in the open and continuous exercise of an undisputed and apparently indisputable right, he arranged to take all the fish of the river in the way he deemed best for his own interest. His predecessors placed salmon cruives below the falls, and so constructed them as to prevent the fish from ascending, and they and he took what has been called the "crop" of the whole waters, at a position most convenient for themselves, with the greatest gain and at the least expense. It seems to me difficult to imagine an exercise of dominion more complete, and an assertion of right more unequivocal. All the *Lovats* could have done, if they had pursued the salmon to the upper waters and appropriated them there, they did by stopping their passage and taking the fish below.

And what they did, they did openly. The cruives were permanent and the fishing was exclusive; and it does not appear that resistance or remonstrance from any person, at any time, raised a single question as to their perfect right to do it.

It has been said, that the formation and the working of the cruives was illegal; and on this an argument has been founded

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

in favour of the Crown. But I do not feel the force of it. On the contrary, if illegality there was, it appears to me, on this question of possession, to tell in favour of the Respondent. If, in the assertion of a claim and the enjoyment of a privilege to which they were not entitled, the *Lovat* family transcended the limits of the law, it was all the easier to call their acts in question, and restrain them from proceedings inconsistent with the rights of others. If the Crown, or any grantee of the Crown, had to complain of the invasion of such rights, the alleged illegality, making that invasion more palpable and injurious, was a challenge to assert them. But no one interfered; the detention of the salmon went on without complaint, and the inference, that it was allowed because it was rightful, was strengthened if it was really illegal. Therefore, I conceive that the argument tells rather the other way. The title of the Respondent is not rested on illegality; and though his acts in asserting it may not have been authorized by law, they could not derogate from that title, even if they did not, as I think they do, tend to demonstrate a complete possession under it.

In my opinion, if the case had stopped here, the Respondent would have given a sufficient answer to the Crown's demand. I do not concur with the Lord Ordinary that "the question as to the right of Lord *Lovat* to fish for salmon above the falls must depend *solely* on the question of fact, viz., whether he has to any, and if so, to what extent *fished for salmon* above the falls in the appropriate manner, and during the prescriptive period?" For the reasons I have given, I think that, acting upon the clear titles to prescribe a right of salmon fishing created by the charters of 1539 and 1774, Lord *Lovat*, under the circumstances, can rely successfully upon his undoubted possession of a part of the river as a possession of the whole, and that the exclusive dominion which he exercised over the fishery below the falls would establish his claim to the fishery above them, whether he has proved or failed to prove actual fishing in the upper waters. But, in my opinion, he has given abundant evidence, if it were needed, to shew that he had possession above as well as below, and asserted and enforced his right to it, for a longer period than is necessary for the maintenance of his argument.

It is to be observed, in the first instance, that there seems to be no controversy about the adequacy of the possession of Lord *Lovat* of the upper fishings since the year 1862. This is, equally and expressly, conceded by the Lord Ordinary, whose view was adverse to the Respondent, and affirmed by the Judges whose view was in his favour. Until 1862, when the *Salmon Act* was passed, close cruives were maintained in the lower waters, and the effect of them is thus described in the evidence of Lord *Lovat:* "When the cruive was a close cruive, any fish was kept there which could not pass through the aperture an inch and a half wide. All salmon and grilse would thus be stopped; all fish of any weight more than a pound a half."

If the cruives were broken down and the fish could get up, at any time before 1862, the proof is that there was fishing with net and coble above the falls; and, after that time, when the cruives were removed altogether, net and coble fishing there went on every year, sometimes for the profit from the fish, and, always Lord *Lovat* has sworn, "to maintain his rights." And it is notable, that whilst this fishing was practised openly, at least, on the admission of the Crown, for some fifteen or sixteen years, affording the clearest evidence of possession, and consistent with the Respondent's title to it,—it does not appear to have been the subject of interruption or protest by anyone.

But whilst this was also admitted by the Lord Ordinary, he was of opinion that the want of proof of salmon fishing above the falls, during the antecedent seventeen or eighteen years which were needed to complete the period of prescription, was fatal to the Respondent's case. I cannot think so, after a full consideration of the documentary and oral evidence of the transactions of those antecedent years.

Whilst the close cruives existed, the river above the falls was, as I have said, for fishing purposes comparatively worthless, and did not require or justify, on the part of the proprietor, such continuous and special attention as was necessary when it became more productive. But, in the actual circumstances, the exercise of control, the assertion of ownership and the protection of right, were quite as full and careful as could reasonably have been expected. I do not trouble your Lordships by going through the

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

mass of evidence on this matter, but I shall indicate the points which it seems to me to establish.

In the first place, there is proof that long before the commencement of the period of prescription, the *Lovat* family, and their tenants and friends by their permission, fished all through the river. There was rod fishing as well as net and coble fishing, more or less, above as well as below the falls. The upper waters were usually let, as were the lower, and the tenants of shootings above the falls practised salmon fishing in every year opposite their holdings, as Lord *Lovat* says, "for payment of rent." The *Chisholm*, also, fished in the upper waters with the rod; but his action was permissive. Lord *Lovat* did not interfere with him, according to the evidence, because he knew that rod-fishing would not establish a right, and because he desired to make no breach of friendship with a neighbour; but, as soon as a legal conflict arose between them the *Chisholm* was defeated, and when his factor, *Robertson*, attempted to act, adversely and as of right, in taking the fish, he was arrested by Lord *Lovat's* keepers and paid a penalty of twenty shillings to stay proceedings. The course of action, thus indicated by uncontradicted proof, as to the user of the fishings above as well as below the falls, is scarcely consistent with the validity of a latent right which, all the while, it must have habitually violated.

The documentary evidence is of great consequence on this matter of possession. A long series of leases are in proof, executed, successively, from the commencement of the eighteenth century downwards, which all proceed on the assumption of the right of the lessors to the fishings of the *Beauly;* and grant to the tenants advantages and impose upon them obligations which were not altogether illusory, only on the condition of the justice of that assumption. Thus, a number of the *Lovat* leases, dated before 1814, of lands far above the falls of *Kilmorack*, are carefully framed to secure access for the lessor to the river, with facility of enjoying the salmon fishing, whilst they forbid the lessee to fish for himself and bind him to watch the water for the benefit of the lessor.

Then there is another series of leases of the fishings of the *Beauly*, making no distinction between those above an those

below the falls, and implicitly asserting a full and an equal right to exclusive dominion over both. One of the latter class of leases is remarkable as having been made by "the Commissioners and Trustees of the Forfeited Estate of *Lovat*, in the month of May, 1757." They recite their appointment, and proceed to "demise 'all and whole the salmon fishing on the water of *Beauly* with the cruives and corffhouses thereto belonging . . . . which salmon fishing is a part of the forfeited estate of the said *Simon*, late Lord *Lovat*, &c.'" Certainly, this lease is a document of importance. It tells us what the Crown conceived to have been the property of Lord *Lovat* in "all and the whole the salmon fishing in the water of *Beauly*." Whatever, so possessing, he forfeited, in 1745, now belongs to the Respondent. The lease seems at once an act of possession, and an admission of title, by the Crown. There is another lease of 1771, from the same Commissioners, containing the same description of the property demised, and, when the charter of 1774 had revested the estate, we find Colonel *Fraser* making leases which adopt that identical description. I fail, with Lord *Ormidale*, to appreciate the force of the Lord Ordinary's observation, as to these leases, that "there is nothing in them to shew the limits of the fishings." The claim of the Respondent is to the whole of those which were in the "water of *Beauly*," and the want of such limits is what might be expected in a grant or a lease designed to deal with them all.

Finally, my Lords, we have the evidence of watching above the falls for a long series of years, which seems to me of the most persuasive kind. The watching was exactly such as the state of the property required. Lord *Lovat* tells us that, from his earliest recollection, watchers were sent up as soon as the fishing below was closed, and were kept there until the spawning was over; that they watched up to the falls, and as far as salmon would go; that they watched any of the rivers which are tributaries of the main stream where salmon would go in any numbers; and that the gamekeepers were always told to keep people from fishing even during the open season. Mr. *Peter*, his agent, corroborates the statement, and proves the regular payments of the watchers by himself. He says that "no other body watched any part of the river;" that "the watchers were never impeded or interrupted in

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord O'Hagan.

any way;" and that "during the open season Lord *Lovat's* keepers had instructions to see that no one fished in the upper reaches of the river." And then we have accumulated proof to the same effect from the Respondent's gamekeepers, fishermen, factors, and others, who shew that not only were orders given to watch throughout the river, but that those orders were obeyed and were effectual for their purpose. Fishers were warned off, and stopped from fishing, either with rod or with net and coble, and when they did not desist they were dealt with by the strong hand; and, as in the case of the *Chisholm's* factor to which I have already adverted, apprehended and punished.

This part of the evidence has impressed me very strongly, although it did not receive much attention from the Pursuer in the course of the argument. The open assertion of a right to protect the waters by the Respondent and by him alone, the universal admission of that right by non-resistance to it, although resistance was challenged continually, and there were proprietors in the neighbourhood having strong interest and full capacity to make it, if they had had a chance of making it successfully,—these things corroborate at once the case of title and the case of possession. There is no conflict as to the facts, and they seem to me to furnish all the *indicia* of a rightful claim, immemorially established and actively and unequivocally asserted on all fit occasions.

As to the minor question raised for the first time by the Lord Advocate in this House, I doubt whether it should be entertained. No reference was made to it in the pleadings, in the arguments before in the Court of Session, or in the "reasons" relied on by the Appellant's case. But if your Lordships should approve the suggested modification of the interlocutor, leaving it open to future discussion, I do not think that the change should affect the costs, to which and an affirmation of the judgment, so modified, the Respondent, for the reasons I have given, appears to me to be entitled.

LORD BLACKBURN:—

My Lords, it is not disputed on the part of the Respondent that salmon fishings in *Scotland* belong to the Crown *jure coronæ*,

and, consequently, that the conclusion of the summons in this case, that

It ought and should be found and declared, by decree of the Lords of our council and session, that the whole salmon fishings in the rivers *Affaric* and *Cannich*, and their tributary rivers, streams, and lochs, and in the River *Glass* (part of which is sometimes erroneously called the *Beauly*), down to the falls known as the *Falls of Kilmorack*, with its tributary rivers, streams, and lochs, in the parishes of *Kilmorack* and *Kiltarlity*, and county of *Inverness*, belong to us *jure coronæ*, and form part of the hereditary revenues of the Crown in *Scotland* falling under the management and control of the said Commissioners of our Woods, Forests, and Land Revenues; and that the said Right Honourable *Simon* Lord *Lovat*, *James Sutherland Chisholm*, *James Gordon Oswald*, and Sir *Dudley Coutts Marjoribanks* have no right or title, and that none of them have any right or title to fish for or take salmon, grilse, or other fish of the salmon kind in the said rivers, streams, and lochs in the said parishes and counties, or any of them, in any manner of way,

was right as against all the landowners who could not shew, either by express grant from the Crown or by a habile title followed by the necessary possession for the proper time, a title against the Crown. Three of the landowners made no defence, and they are out of the case, except in so far as their titles or their possession may be relevant to the title claimed by Lord *Lovat*, who does appear and sets up and has endeavoured to prove a title to the whole of the salmon fisheries, not only in the waters above the falls, by whatever names they are called, but also in the waters below the falls, which fishings, as he maintains, are all held by one title, a title to the whole of the salmon fisheries in all the streams which ultimately flow into the Firth of *Beauly* from their source to the sea.

It was not disputed that Lord *Lovat* and his ancestors have a perfect title to the salmon fisheries from the falls to the sea. It was disputed, very strenuously, that the title which was good for the salmon fishings below the falls was, as his contention was, equally good for the salmon fishings above the falls.

The title on which Lord *Lovat* relied consisted of documents which, it was argued on his behalf, when coupled with parol evidence, more particularly as to the position of a spot called *Cairncote*, or *Cairncross*, to explain them, amounted to an express grant of the salmon fishings in the whole of these waters in dispute, and which at all events shewed a baronial title to much the

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

greater part of the lands through which the waters flow; and of evidence which he contended shewed such possession of the salmon fishings for so long a time as to make the baronial title sufficient throughout the barony at least.

The Lord Ordinary (1), by his interlocutor, found that Lord *Lovat* had proved no title at all above the falls.

He explains his reasons in a very carefully prepared note (2).

The interlocutor of the Second Division was as follows:—

Edinburgh, 7th March, 1879.—*The Lords having heard counsel on the reclaiming note for the Defender, Lord Lovat, against Lord Curriehill's interlocutor of 20th August,* 1878, *recal the said interlocutor;* of new find that the said Defender has no right of salmon-fishing in the streams *Affaric* and *Cannich,* and to that extent and effect repel the defences, and decern and declare in terms of the conclusions of the summons. *Quoad ultra sustain the defences, and assoilzie the said Defender from the conclusions of the summons, and decern: Find the Defender entitled to expenses, and remit to the auditor to tax the same, and to report.*

This interlocutor proceeded on the ground that Lord *Lovat* had made out no express grant to the salmon fishings in the two streams named which lie entirely out of his baronies, but had established a sufficient title to the salmon fishings within his barony. Against this interlocutor Lord *Lovat* did not appeal. The Lord Advocate did. It would, therefore, have been enough to dispose of the appeal if this House was satisfied that there was sufficient proof of such possession, and for so long a time, as to support this finding, had it not been the fact that the barony of *Comarmore,* which never belonged to Lord *Lovat's* ancestors, came down to the river in two places, and there the barony of *Lovat* only includes the south-east or right side of the river—one of these places is in *Strath Glass* where the lands of *Western Comore,* which are part of the barony of *Lovat,* occupy the right side only. Those lands are specifically named in an early charter to which I will allude afterwards. The other place was at *Breachachy,* where the barony of *Lovat* occupies the right side, but I have not been able to trace the name of the particular lands forming that part of the barony. The Lord Advocate said the interlocutor was at all events wrong, for the same reasoning that led the Second Division to find against the title of Lord *Lovat* to the *Affaric* and

(1) Lord *Curriehill.* (2) Scot. Law Rep. vol. xvi. at p. 420.

Cannich ought to have led them to find that he had no title to more than the salmon fishings *ex adverso* that portion of the barony which lay only on one side the stream; or at least that the interlocutor should be altered so as to prevent its being *res judicata* against the Crown that the Crown had not retained its salmon fishings *ex adverso* the barony of *Comarmore*. This point does not seem to have occurred to anyone on either side till they came into this House. It is not of nearly so much importance as the main ground of the appeal. But as the counsel for the Respondents resisted it, and in so doing relied, in part at least, on the express title which the Judges below had all negatived, it renders it necessary to consider the whole case.

I think it will be most convenient to examine first the documents put in evidence.

Being printed for the use of the House, they can be examined more minutely than could have been conveniently done below.

Many of these documents have not been regularly proved. They are admitted, as taken apparently from some antiquarian publications. And though I doubt very much whether some of them could have been proved, I think this House ought to act upon the admission, and take the documents as if proved to be what they purport to be. But many of the documents, such, for instance, as the different genealogical statements, are not, I think, evidence at all. I mention this because the genealogical statement of the family of *Ross of Kilravock* (though some of the other genealogies do not agree with it) seems to be accepted by Lord *Curriehill* and by the Lord Justice Clerk (1), as sufficient to establish that *John de Bisset* had three daughters co-heiresses, their names, and whom they married. It is of no consequence, in the view I take of the case, whether he had or had not children, or whether those children were male or female, but such documents seem to me not in a Court of Law evidence of anything. But there are other documents much more relevant.

Before beginning to examine them I may remind your Lordships that the system of conveyancing, founded on feudal investiture, now established throughout *Scotland* was not indigenous. In the *Highlands* the old habits, founded no doubt on the laws of

(1) Scot. Law Rep. vol. xvi. at p. 425.

H. L (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

the Scots and Brets, long prevailed; even down to the rebellion in 1745 there were some proprietors who continued to hold their lands, as their ancestors had done, by occupancy and the right of the sword, and treated with scorn those who held their lands in a sheepskin. It is not surprising, therefore, to find a lack of early titles in a Highland district. But after the Crown acquired strength, and proceeded to enforce the feudal system, the position of those who held by such a Highland title became precarious, and feudal titles began to prevail.

The greater part of the salmon fishings in question lie within the ancient Earldom of *Moray*, the remainder lie within the ancient Earldom of *Ross*. The charter of 1512 mentions the forefeiture of both those earldoms. Nothing more appears on the documents in process concerning the Earldom of *Ross*, but from general Scotch history we know that after troubles, rising to the dignity of a civil war, during which occurred the battle of *Harlaw*, it was finally inalienably annexed to the Crown by an Act of the Scotch Parliament.

More appears about the Earldom of *Moray*. An extract is set out from the charter by which *Robert the Bruce* grants to his nephew *Thomas Randolph* all the king's lands in *Moray*, such as they were, in the hands of King *Alexander*, and this specifies the boundaries of a territory stretching northwards from the *Spey* on the east coast, and from the bay of *Glenelg* on the west, till it meets the Earldom of *Ross*, which also stretched from sea to sea. The precise date of this charter does not appear, but *Robert the Bruce* first laid claim to the kingdom of *Scotland* in 1306, and was in full possession after the battle of *Bannockburn* in 1314. *Thomas Randolph*, Earl of *Moray*, died Regent of *Scotland* in 1332. After his death a turbulent time ensued; and in 1454, in the reign of *James* II., the Earldom of *Moray* was finally annexed to the Crown, and then it appears from the accounts of the King's Chamberlain beyond *Spey*, in 1456, that he charges himself with the proceeds of the lands of the *Ard*, *Strathglass*, *Abertarf*, and *Strathardock* which were in the hands of the king since the death of *Thomas Fraser* of the *Lovat* as being in ward of the Earldom of *Moray*. The lands of the *Lovat* were, I conjecture, at the time held as jointure lands. At all events, the proceeds of those lands are not

then accounted for as being in the hands of the king. This is, I think, the first evidence of the *Frasers* holding lands either of the Earls of *Moray* or of the Crown on which a Court of law could act. The evidence that they held lands from the Bishop of *Moray* goes back a good deal earlier.

In 1367 *Hugh Fraser*, there styled *dominus de Lovat portionanus de le Ard*, does homage to the Bishop of *Moray* for *Knytallergy* and the fishing in the esse or linn there, which leads to an inference that between 1258 and 1367 the lands of *Lovat* and *Ard*, which at the earlier date were the property of *John Bisset*, had come into the hands of the *Frasers*.

The titles from, I think, 1499 downwards seem complete, but reliance is placed in the very able argument contained in the Respondent's case on the documents which, on the admission, we must take as proved relating to the state of things from 1171 down to the grant of *Robert the Bruce* to his nephew *Thomas Randolph*.

It appears that *William* the *Lion* granted the Bishop of *Moray* tithes of all his returns from *Moray* throughout the whole bishopric of *Moray*.

The charter of King *Alexander* in 1221 confirms a compromise of a controversy between the Bishop of *Moray* and *John de Bisset* as to, amongst other things, the tithes of the returns from certain lands to the Crown made "before the said lands were to the said *John* given and granted."

This sufficiently shews that *John de Bisset* had got a grant from the Crown of those lands some time between 1221 and the grants of the tithes of the Crown returns made in 1171. The Crown returns there specified seem to have all been payable in kind; cattle, pigs, corn, cheese, and butter are all specified. There is no mention of fish of any kind, but it is not at all improbable that part of the returns may have consisted of fish. In the composition itself fishings are mentioned, but salmon fishings are not specified. It is most probable that the fishings were in reality salmon fishings. And in the charter of *Alexander* II., of 1232, the King grants to the Bishop of *Moray inter alia*, "20 shillings coming from the lands of *Lovat* which belong to *John de Bisset*," shewing that he held the lands of *Lovat*.

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

Now I think this is evidence that *John de Bisset* held the lands of *Lovat* and the lands mentioned in the composition of 1224 by grants from early kings. And it is very likely, though not proved, that the *Bissets* held many more lands in that district. But I can see nothing to give rise to even a surmise that the grants to *John de Bisset* were made in the terms which according to the modern doctrine of conveyancers are required to give salmon fishings, or even in the terms which are required to give a *habile* title to found a prescription.

I do not doubt that, as a general rule at least, those who in those early times held lands from the Crown did, however their title was expressed, enjoy the salmon fishings with the lands; and that the doctrine that being *inter regalia* salmon fishings remain in the Crown unless there is mention of them as being granted out is of much more recent origin.

But when the *Bissets* lost the lands they lost their salmon fishings, and as there is no evidence of a legal title taking the salmon fishings in the *Bisset* lands out of the Crown, there is no occasion to shew a legal title revesting them in the Crown. In the beginning of the reign of *James* IV., when the titles become regular, the name of *Bisset* has disappeared from the landholders in this district. How this came about in the course of the two centuries and more which elapsed between the last mention of *John de Bisset* in 1258 and the time when the titles became clear must be matter of conjecture.

The *Bissets* were, I believe, a great *Anglo-Norman* family, holding extensive possessions in *England* and *Ireland*, as well as *Scotland*, and, like others in their position, they probably supported *Edward* I. (1). *Robert* the *Bruce* made it the business of his life to drive the *English* and their adherents out of *Scotland*, and his nephew *Thomas Randolph* (a man not, if we may trust the chronicles, likely to pause in any undertaking either for want of ability, courage, or ruthlessness), had ample time to carry out

(1) *Barbour* mentions *Mandeville*, *Bisset*, *Lurgon*, and *Savage*, as the four English lords of lands in *Ulster* who raised a force with which they unsuccessfully attacked *Thomas Randolph* when besieging *Carrickfergus*. But this *Bisset*, though probably a relative, may not have been the *Bisset* who owned the Scotch lands.

this policy in the Earldom of *Moray* between the grant to him of the Earldom and his death in 1332. This seems to me quite sufficient to account for the fact, that when the Earldom of *Moray* was annexed to the Crown others are found holding from the Earldom of *Moray* much of the land which had belonged to the *Bissets*. But this is speculation merely.

I think in deciding this matter your Lordships should look at the titles produced, and those begin in the reign of *James* IV. It is a sufficient ground for your Lordships to act upon that no others are shewn to exist, and that *de non apparentibus et de non existentibus eadem est ratio.*

There has been since the beginning of the 16th century a complete title shewn as to all the lands in the watershed from which the drainage flows into the sea by the river (by whatever name that river is called) which falls over the *Falls of Kilmorack.*

In 1538 King *James* V. erects, in favour of the *Chisholm* of the day, certain lands into the barony of *Comarmore.* That barony it is agreed lay entirely to the north of the main stream, and came down to the main stream, and was bounded by it at two places, one at the upper part in *Strath Glass,* including in it the two affluents specifically named in the interlocutor, the *Affaric* and the *Cannich,* and one lower down at *Breachachy.* There was no express grant of salmon fishings; the Baron of *Comarmore* had, however, a *habile* title to prescribe for salmon fishings *ex adverso* of those two portions of his barony.

All the rest of the lands in this watershed belonged before the end of the 16th century to the *Frasers,* but not all by the same title.

I will state what seems to me the effect of the titles referring to the page in the Appendix which contains the instrument which proves what I say, without reading it, except where the words of the instrument seem material. In 1501 the inquisition, on the death of *Hugh* Lord *Fraser* of *Lovat* (who I suppose was the first peer) finds that he died seised of the castle of *Lovat* and the lands thereof, the third part of the Barony of *Ard,* the Barony of *Abertarfe* with its pertinents, viz., *Strathairch,* and the third part of *Glenelg,* "*et de tribus leys mokvay ballabrait leonach et duabus daltoleis et dalcors cū ptineñ,*" which I cannot translate, and of

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

Guisechan, Comerkyle, Mauld Mains, Western Eskadale, and the two *Buitaits* in the Earldom of *Moray,* and that *Thomas Fraser* was his son and heir.

During his father's lifetime this *Thomas Fraser* purchased portions of the lands of *Mucrow, Poppochie,* and *Ingleston,* from *Henry Douglas.* Hitherto there is no mention in the titles either of fishings or of yairs.

In 1510 *Thomas,* now become Lord *Fraser* of *Lovat,* purchases from *Douglas* of *Culbryny* the whole lands of *Culbryny* with the castle, now called *Beaufort cum* piscaria *aquæ de Forne nūcupat tolly,* other portions of the lands of *Mucrow, Poppochie,* and *Inglistone,* an eighth part of the lands of *Ballydrum,* and half of the *Croft of Downie,* with the fishings of the *yairs.* On his death in 1524 the inquist find that he died seised of the same lands which are mentioned in the inquisition on his father's death, and of all these new acquisitions, and here, though there is no mention of salmon fishings, there is mention of *Beaufort cum* piscaria *aquæ de Forne nūcupat tollie* and of *Downie cum* piscationibus *de lie* yair. The inquest also mentions the lands of *Kilmorock cum lie craig et esse cum piscationibus earun,* all of which it is found lie in the Earldom of *Moray,* except *Kilmorock* and its fishings, which lie in the Earldom of *Ross* and are held in feefarm of the Bishop of *Ross.*

In 1536 *Hugh,* Lord *Fraser* of *Lovat,* purchases from *Forbes* of *Pitsligo, Eastern* and *Western Aigas,* with the mill thereof. Fishings are mentioned in the tenendum clause only. There is no mention anywhere of salmon fishings.

In 1528 *Hugh,* Lord *Fraser* of *Lovat,* purchases the barony of *Erklass, alias Strathglass,* from *Haliburton* of *Gask.* The title of *Haliburton* of *Gask* to the Barony of *Erklass* begins in 1496 by a charter of *James* IV., confirming a grant by *John Haliburton* of *Gask* to *William* his son, heir of "*omnes et singulas terras meas trium p̃tium de Inglistoun terras meas de Kirktoun de Kyngeile cum le* zaris *earundem terras meas de Crywe de Faynellan de Coulach de dimedia p̃te de Kintallirgy et* piscina *ejusdem cum p̃tineñ de Ardblare de parte de Faynblare de duabus partibz de Colmullyne mor de tribz p̃tibz de Beldrum cum Culmullynebeg de Downegorre cum molendino de Beufort cum croftis et brasina de Dunbailach cum* piscina salmonū *de Kulach de Cloynbaky de duabz Arcless et tenente et tenendria*

de Inchbary cum pertineñ et le zare *ejusdem cum tenẽtibus et tenãdriis libertatibz et donacionibz predictis terris temporibz retroactis spectañ.*"

I think there is here an express mention of the salmon fishings of *Dunbalack*, and there is also an express mention of the yairs of the kirktown of *Kyngele* and of the yair of *Inchbary*, but there is no mention of either salmon fishing or yair in any of the other lands and, *expressio unius est exclusio alterius*, I should say, on the construction of that deed, that it was not intended to grant them. At all events such an intention is not expressed.

Next, on the 13th of May, 1512, King *James* IV. erects those lands and others into a barony.

What seem to me the material parts of that charter are as follows:

Jacobus dei gracia Rex Scotorum Omnibus probis hominibus totius terre sue Clericis et laicis salm̃ Sciatis Nos dedisse concessisse et hac pñti carta nr̃a confirmasse dilecto nr̃o Jacobo Haliburtoun de Gask Omnes et singulas terras subscriptas viz.: *tres quartas partes tr̃arum de Inglistoun et terras de Kyngily cum le* zaris et piscacionibus *earumdem terras de Drumballoch cum* piscacionibus *earundem tres q̃tas partes tr̃arum de Balladrum terras de Ardblare tres quartas partes tr̃arum de Fenblare terras de Kelauch̃ et Clonvaike terras de Crew terras de Fenellane cum croftis et* piscacionibus *earumdem terras de Cowlaũch Downis cũ molendino croftis brasinis et* piscacionibus *earumdem terras de Culmolinbeg Binam partem terrarum de Culmolinmore dimedietatem terrarum de Kyntallargie cum* piscacionibus *earumdem in aqua de Forne et terras de Inchbarry cum le* zaris et piscacionibus *earumdem cum om̃ibus suis le outsetis tenentibus tenandriis et liberetenencium s̃uiciis earumdem cum suis pertineñ Jaceñ in baronia de Arde infra vicecomitatum nr̃m de Inn̄nys et terras de duabus Arcles̃ cum suis pertineñ Jaceñ in comitatu de Ross infra vicecomitatũ nr̃m* QUEQUIDEM *terre suprascripte cum molendinis* piscacionibus le zaris *croftis outsetis tenentibus tenandriis et liberetenenciũ s̃uiciis earumdem cum suis pertineñ fuerunt dicti Jacobi hereditarie et quas idem*

he had resigned into the king's hands, and which the king erects

cum molendinis le zaris piscacionibus *croftis le outsetis tenentibz tenendriis ac liberetenenciũ s̃uiciis earumdem et suis pertineñ vnacum terris de le Kirktoun de Inglistoun Jaceñ in dicta baronia de Arde ac omnes et singulas terras de Westir Struse esp̃ Struse Culguyri estir Croychell Westir Crochell Westr Comyr Kilbaddy et Daheny cum piscacionibz et le outsetis om̃i predt̃arum tr̃arum et suis pertineñ Jaceñ in Straithglasche in comitatu nr̃o Rossie infra vicecomitatum nr̃m de Innys antedict̃ Que fuerunt etiam dicti Jacobi et predecessorum suorum hereditarie et per ip̃os sub reversionũ et regressuũ litteris alienate into a barony to be called baroniã de Arcless*

* * * * *

and the king further grants everything which might be claimed

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

by the king by reason of "*forisfacture comitum Morauie vel Rossie de quibus dicte terre olim tenebantur.*"

In this charter again there is express mention of yairs in some parts of the lands. It may be difficult now to prove where these yairs were situated, but I think it may safely be said that they were not in *Easter* or *Wester Stuyse*, nor in *West Comar*. This is material with reference to an opinion of the Lord Justice Clerk, on which I shall afterwards remark.

Then comes, in order of date, the charter of 1539 erecting the greater part of the lands held by Lord *Lovat* into a barony. Under that title the greater part of them were enjoyed down to the forfeiture in 1745. As to the language of that charter I will only express my concurrence in what the Lord Ordinary says, which I think was agreed in by all the Lords of Session.

The Lord Ordinary says,

> In 1539 *Hugh* Lord *Fraser* obtained from *James* V. a charter erecting into a new barony of *Lovat* several baronies then belonging to him, and, *inter alia*, '*Terras et Baronias de Lovet Strathaurick Ard Abirtarf Hereicles* (Erchless) *alias* Straglass *et Dalcoss, Terras de Ardranicht, Kebirne quaterium de Belladrum Terras de Irrichich et Bellicharnock Tertiam partem terrarum de Glenelg cum castris turribus fortaliciis partibus pendiculis outsettis annexis connexis molendinis multuris piscationibus super aquas de Forne et Aveche et omnibus aliis piscationibus.*' These several lands and baronies are, many of them, in far distant parts of the county, and in no way connected with any part of the river in question, and I think that it must be held, in the absence of evidence to the contrary, that the fishings in the water of *Forne* here referred to, are the fishings of that name specified in the earlier titles of the component parts of the new barony, and particularly in the barony title of *Erchless*.

His Lordship proceeds to add what implies that in his opinion there were express grants of salmon fishings in the earlier titles to *Lovat*, which I think is an oversight; at least I can find none. And he adds that all the fishings of which express mention is made were below the Falls of *Kilmorack*, which may be the fact but is far from being clear to my mind.

It is agreed that this charter of 1539 included all the lands in this watershed, to the south-east of the stream from its source in *Strath Glass* to the sea, with the exception of a portion of the land at *Kiltarlity* and the fishing there in what is called the lin or esse; the one word being the Lowland Scotch and the other the Gaelic for a pool below a fall or rapid.

This he and his ancestors had for a long time held, not from the Crown, but from the Bishop of *Moray*, and apparently this portion of *Kiltarlity* was not included in the grant of barony which included all his other lands; another portion of *Kiltarlity* had been, by a less scrupulous scribe, who ignored the bishop's superiority, included in the barony of *Erkless*, which also had come to Lord *Lovat*, and was included in the barony of *Lovat*. It is agreed also that this grant included in the barony of *Lovat* which it created all the lands on the north of the stream from below the part of the barony of *Comarmore* which comes down to the *Glass*, and above *Breackachy*, including the whole course of an important affluent, the *Farrar*, of which mention must be made hereafter when examining the proof of possession. Below *Breackachy* the lands on the north side of the steam down to the sea belonged to the Prior of *Beauly*, with the exception of the lands of *Kilmorack* and the salmon fishing in the lin or esse on that side of the river, which from an early time had been held by the *Frasers* from the Bishops of *Ross*.

In the retour of the service of *Hugh* Lord *Lovat* as heir to his father *Thomas* in 1524, special mention is made (at p. 134 C. 4.) of "the lands of *Kilmorack* with lie *crage et esse* with the fishings which lie in the Earldom of *Ross* as they are held in feefarm of the Bishop of *Ross* and his successors, paying therefor annually £10 6*s*. and 10*d*. Scotch," and in 1532 *Hugh* Lord *Lovat* obtained from the papal nuncio a precept directed to the Abbots of *Kynless* and *Perne* to have his grant from the former Bishop of *Ross* confirmed by the present Bishop of *Ross*, which is done.

Kilmorack and the fishings thus held from the Bishop of *Ross* are not included in the barony of *Lovat* created in 1539, nor did they form part of the possessions of the monks of *Beauly*. This is of some consequence in construing the title derived from the charter of the Prior of *Beauly* which I will next come to. It is of no consequence in any other way, for *Kilmorack* and its fishings are by name included in the new barony of *Lovat* erected in 1774, as also are the lands of *Kiltarlity*.

In the beginning of the reign of *James* VI. the Lord *Lovat* acquired the barony of *Beauly* from the prior and convent. The transaction was a questionable one, and, probably for that reason,

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

pains seems to have been taken to make it as good, on paper, as Lord *Lovat's* lawyers could. First, on the 19th of September, 1571, *Alexander Aitcheson* and *Helen* his spouse surrender into the hands of *Walter*, abbot of *Kinloss* and prior of *Beauly* and the convent of the priorie "superior and our overlords of the lands, barony, fishings underwritten, * * to the effect that the said prior and convent may dispose of them to their pleasure."

On the 2nd and 6th of November in the same year *Walter*, abbot of *Kinloss* and prior of *Beauly* and the convent, being thus put in possession of the barony, execute a charter of feu to *Hugh* Lord *Fraser* of *Lovat* and his heirs of all and singular the barony of *Beauly* underwritten to hold of the prior and convent, rendering what probably was the ancient rent annually to the prior and convent as his overlords. Then, on the 6th and 12th of November in the same year, there is a charter executed by the same *Walter*. It is not set out at full length, but I take it to be a conveyance by the prior and convent of the barony of *Beauly* to hold from the Crown. And on the 14th of February in the same year, but which, as the style has been changed, would now be called in the ensuing year, 1572, there is a charter of King *James* VI. confirming this last charter; as long as this remained unchallenged the feu duty would be payable by the Lord *Lovat* to himself. If it was set aside he could fall back on the charter of feu.

Then follows a charter of feu, dated the 5th of May, 1575, from *John* prior of *Beauly*, who, I conjecture, had some colour of claim adverse to that of *Walter* abbot of *Kinloss* to be the prior, obviously intended to be of the same effect as the feu of the abbot but in fact varying from it one or two words.

And in 1584 an Act of Parliament was obtained ratifying the feu by the abbot of *Kinloss*, which it recites with some variation in words, but not noticing the conveyance of the barony.

In the charter of feu granted by *Walter* abbot of *Kinloss* prior of *Beauly* and the convent, is this passage: "*Ac etiam omnes et singulas piscarias nr̃as salmonū pisciū nobis competeñ et spectañ in et super aquā de forme extenden. a lie carnecott usque ad mare vel alṫs ubilibet in dicta aqua inter salmonū piscarias dicti nobilis dñi hugonis dñi fraser de lovatt de Kilmorak usque ad mare cum lie cruffis et singulis suis proficuis jaceñ infra prioratū de bewlie et vice-cōmi-*

tatum de invernes ac cum omni jure," &c. "*necnō dictas salmonū piscarias superius specificatas prefato nobili et potenti dño hugoni dño fraser de lovatt heredibusque suis masculis et suis assignatis quibuscumque de nobis et successoribus nr̃is dicti monasterii de bewlie prioribus aut cōmendatariis ejusdem in feudifirma.*"

It is somewhat differently given in the Act of Parliament confirming this, as follows: "And also all and haill the salmound fischeingis in and vpoun the water of *Forne* merchand fra *Carncot* to the sea or ony vther pairt on the said water amang the fischeingis of ane noble lord *Hew* Lord *Fraser* of *Lovat* of *Kilmarok* with cruvis and vther commoditieis within the priorie of *Bewlie* and Shirefdome of *Innervness* to be haldin of the saidis prior. and convent and thair successouris." This is undoubtedly hard to construe. I have already pointed out that at this time Lord *Lovat* held the barony of *Lovat* from the Crown, and also by a separate title held *Kilmarock* and the fishings there from the bishops of *Ross*, and this I think throws some light upon what was intended. But the only thing which I think is quite clear is that the passage in the charter of Novodamus of 1774 (p. 182, line B) has reference to this, and that *Cairncross* there mentioned is the same place as *Cairncote*.

It is under these titles that the Lords *Lovat* held their land of *Beauly* down to the forfeiture of *Simon* Lord *Lovat* in 1745, and, questionable as it probably was originally, after so long a possession it cannot be shaken. The *dominium utile* in portions of the lands in the barony of *Lovat* was in the beginning of the 17th century alienated, but the superiority in the baronies and lands was unaltered, and it is not contended that any salmon fishings which had before 1745 been acquired by the Lords *Lovat* had returned in any way into the hands of the Crown before the forfeiture.

In 1774, King *George* III., by virtue of an Act of Parliament empowering him so to do, of new gave and granted to General *Fraser* and his heirs all that had been forfeited to the Crown in 1745. I do not cite its terms, for I do not think there is room for any difference of opinion as to the construction of this charter of Novodamus.

It expressly gave to General *Fraser* everything which had

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

belonged to the Lords of *Lovat* before the forfeiture, and had by that forfeiture come to King *George* II. and no more. The salmon fisheries expressly granted (at p. 179 E. 2), are those which came to *George* II. by the forfeiture of *Simon* Lord *Lovat*.

But, as all those lands were then erected into a new barony, it gave to the grantee and his heirs and assigns a habile title on which they might found a prescription, and between 1774 and the date of the summons, 1877, there was ample time for a prescription, and part of the case for the defence is that during that time there was a sufficient possession to establish a prescription.

My Lords, I have stated at some length and in what I fear may be tedious detail the titles appearing on the documents, because I think that when they are apprehended this appeal may be disposed of without deciding any controverted point as to the law of salmon fishing in *Scotland*. I do not say what might or might not have been the construction of the charter of Novodamus in 1774, if it could have been shewn that the place called *Cairncross* in that charter and *Cairncot* in the charter of feu in 1571 was situated at the upper part of *Strathglass* some twenty miles above the *Breackachy Burn*, which seems to have been the march of the priory lands of *Beauly*. As it is, I agree with what was the opinion of the Lord Ordinary and of all the three Lords of Session in the Second Division, and I believe of all the noble and learned Lords who heard the argument, that it is not proved where *Cairncross* or *Cairncot* was. Neither in my view of the case is it necessary to decide whether the old name of *Forne* was confined to the river flowing *ex adverso* of the priory lands or extended to the whole river, with its affluents, which there flowed into the sea.

It is not and could not be disputed that the grant of a barony gives a title which, though it does not carry with it the right of salmon fishing within the bounds of the barony, is a habile and competent title on which by proof of possession for forty years to found a title.

The Lord Justice Clerk, however, takes a view of the effect of the charter of 1512 erecting certain lands into the Barony of *Erkless*, which it is necessary to notice.

He says:

Now, that charter, which I think the Lord Ordinary has not sufficiently adverted to, unites into the barony of *Erchless* lands below the falls, and lands above the falls; as, for instance, *Fenellan*, which is partly above and partly below; the lands of *Crew*, which are above; the lands of the two *Erchless*, which lie entirely above; the lands of *Struy*, wester and easter; *Croichail*, wester and easter, and *Comar*, all of which lie above the falls. This brings us up close to the junction of the *Affaric* and the *Glass*, and all those lands are erected into a barony *cum molendinis le zaris piscationibus croftis*, and so on. And when we come to the tenendas clause, it concludes thus as regards the whole lands: '*Nunc unitas, annexatas, et incorporatas in una libera baronia—cum molendinis piscationibus lie yaris*,' &c.

These lands, therefore, embracing many of the lands in dispute—*Erchless*, *Struy*, *Comar*, *Croichail*, *Fenellan*, *Crew*, all above the falls—are united into a barony *cum piscationibus lie zaris*. The terms of the tenendas clause, whatever may be said of the prior part of the disposition, are quite general and universal, and on the principles which we took occasion to lay down in the case of *M'Culloch* (1), we are here entitled to infer from the generality of the tenendas that these lands were erected into a barony with 'fishings called zaris,' and that, in my humble opinion, is nothing more or less than a grant of salmon-fishings, extending throughout the whole course of the stream which I have already described.

If this is a correct view of the effect of that charter, it would undoubtedly follow that the Crown had parted, in 1512, with the salmon fishing throughout the Barony of *Erchless*, and as it is not shewn or even pretended that any rights then parted with were resumed before the forfeiture of *Simon* Lord *Lovat* in 1745, it would decide a great deal of what is in dispute, but not all, for the lands of *Eastern* or *Western Aigas* were acquired in 1536 by *Hugh* Lord *Lovat*, and were not part of the Barony of *Erchless*. But I am not prepared to assent to this. The charters to the *Halyburtons* in 1496 and 1512, of which I have already read what seem to me the material parts, shew that there had been an express grant of salmon fishing in the lands of *Dunbalach* and more than one grant of lands with yairs, and I agree that a yair or a cruive is a fixed engine for catching salmon, so that a grant of a yair or a cruive is a grant of the right to catch salmon in that particular yair or particular cruive. And those lands are erected into a barony *cum piscationibus lie zaris*. I agree in thinking this is equivalent to a grant to take salmon by those yairs at those spots where those yairs were situated. But what I am not prepared to assent to is that such a grant is equivalent to an express

(1) Court Sess. Cas. 4th Series, vol. ii. p. 27.

H. L. (Sc.) 1880 LORD ADVOCATE v LORD LOVAT. Lord Blackburn.

grant of salmon fishing throughout the whole barony. It is not, however, necessary to decide this point. I agree with Lord *Gifford* (1) that it is enough for the decision of this case to say that Lord *Lovat* had, as early as 1539, an ample and sufficient title to prescribe a right of salmon fishing as far as the barony of *Lovat* extended.

It is on the sufficiency of the proof of possession and the nature of that possession which is proved that the difference of opinion between the Lord Ordinary and the Inner Division becomes important.

There seems no doubt that salmon fishings by net and coble all along the river below the falls of *Kilmorack* have been enjoyed by Lord *Lovat* and his authors, not only where there were old cruives or yairs, not only in one particular place or another, but the whole way, at different spots, on both sides of the river, and at such places as the state of the water for the time made good drawing places —in short, wherever they wished to fish. This is the undisputed account of what was done as far as living memory goes, extending more than forty years, and I see no reason to doubt that this had been done at least from 1571. And this part of the river is all within the barony of *Lovat* erected in 1774 by the charter of Novodamus, and, except the cruives at the lin or esse of *Kilmoroch*, is all within the older baronies of *Lovat* and *Beauly*.

The Lord Ordinary says:

> Now, as I have already explained, the only express grants of salmon-fishings in any of Lord *Lovat's* titles is in connection with lands below the *Falls of Kilmorack*, and the question is, whether these lands and the lands above the falls having been all united into one barony, a right of salmon-fishing over those parts of the barony in connection with which there are no express grants, has been established by the possession which the Defender has proved. Now it is clearly proved, and not disputed, that in virtue of their titles Lord *Lovat* and his predecessors have for centuries had the full and exclusive possession of the whole salmon-fishings below the falls. But I think that as the fishing for salmon below the *Falls of Kilmorack* was practised either in virtue of express grants of salmon-fishings or of '*piscationes*,' in connection with particular lands on that part of the river, such practice is quite insufficient either to create or imply a right of salmon-fishing in the river above the falls. The question therefore as to the right of Lord *Lovat* to fish for salmon above the falls must depend solely

(1) Scotch Law Rep. vol. xvi. at p. 432.

upon the question of fact, viz., whether he has to any, and if so, to what extent, fished for salmon above the falls in the appropriate manner and during the prescriptive period?

I am inclined to agree to some extent in what I may call the major proposition here laid down. I think that though the cruives at *Kilmorack* have since 1774, now a full century, been part of the Barony of *Lovat*, it would be unreasonable to say that the use of those cruives for that century in the same way as Lord *Lovat's* authors had used them for two or three centuries before was evidence on which a Court could act of possession under the new baronial title. But I must deny his minor. There is evidence of express grants of fishing with yairs at some fixed points along the right bank of the river, and it may not be easy now to ascertain where these spots where, and those were included in the Barony of *Erchless*, but I do not think there was any express grant of salmon-fishing on the whole of the right bank below the falls so far as it was included in *Erchless;* and I cannot find any evidence of a grant of any kind of the fishings with regard to the lands of *Lovat*, which never were in the Barony of *Erchless* at all, before the lands of *Lovat* were included in the barony created by the charter of 1539, and I think therefore that there is sufficient evidence of possession of part of the salmon fishery in this river under the baronial title, at least from 1539, more than three centuries. The weight of this, as proving possession of the salmon fishing through the whole river, depends upon different considerations.

I quite agree in the decision in *The Lord Advocate* v. *Sir John Cathcart* (1); if it had been attempted here to use this possession of salmon fishings in the *Beauly* as proving possession of salmon fishings in the Bay of *Glenelg* that case would have been directly in point. But that case has no application to the case before the House, where it is a question whether there was possession of the salmon fishing throughout one river and its affluents so far as they lay in the barony; that one river is, as expressed by the Scotch Judges, a *unum quid*—as it has been expressed in *England* in *Jones* v. *Williams* (2), by Baron *Parke*, a subject having such a common character of locality as to raise a reasonable inference that he who had possession of one part of it had possession of the

(1) Court Sess. Cas. 3rd Series, vol. ix. p. 744. (2) 2 M. & W. 326.

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

rest. I retain the opinion which I expressed in *Lord Advocate* v. *Lord Blantyre* (1) that this possession of part is evidence, but not conclusive evidence, of possession of the whole, its weight depending upon circumstances. What in my mind gives it in this case great weight is that this undisputed possession was of the salmon fishings in the whole of that portion of the river in which the salmon fishings were of any commercial value. Still, if it had been shewn that either the Crown or any other proprietor had been in adverse possession of any portion of the salmon fisheries higher up the river, I should have paused before acting on this piece of evidence alone; but this is not so.

What evidence there is of possession of salmon fishing above is all in favour of Lord *Lovat*. No one else appears ever *de facto* to have fished for salmon, unless with the rod, in the upper part of the river. No one ever set up a claim to a right to fish there, except the *Chisholm* in 1801, and he failed in his attempt. The oldest tack produced, that of 1701, expressly mentions the fishings in the *Farrar*, which is above the falls. The later tacks, beginning in 1757, though not expressly mentioning fishings in the upper part of the river, are not in terms limited to the fishings below. The Lord Ordinary thinks that the tacks of fishing, if they included fishings above the cruives of *Kilmorack*, could not have been acted upon. This is on the assumption that the illegal mode of fishing by a close cruive without allowing any weekly slop, which prevailed for at least sixty years before 1862, must have prevailed for centuries before. I do not see how this is made out. The illegality of this mode of fishing would not go for much. The law, said the old proverb, did not come further than *Inverness*. But surely the old Lords of *Lovat* may have read the fable of the man who killed the goose that laid the golden eggs, and for their own sakes have acted and made their tacksmen act on the policy of the old Scotch Acts. The *vivâ voce* evidence, as far as it goes, is all in favour of Lord *Lovat*. It is not such that if it stood alone I should like to act upon it, for the fishing by net and coble annually to assert the right did not begin till 1862, much less than forty years ago, and the evidence of prior acts is very meagre. Still, this is all confirmatory of the inference

(1) 4 App. Cas. at p. 791.

which I draw from the undoubted possession of the fishings in the only part of the river where they were of value. I cannot express my meaning better than by adopting as my own the concluding words of Lord *Gifford's* opinion:

This is one continuous river from source to sea. The interposition of the *Falls of Kilmorack* on the river does not make the least difference; it does not spoil the continuity of the stream. Now, in the special circumstances of the locality, and which are essential to be kept in view, the falls make this river, and the character of its salmon fishings, different so far as below and so far as above the falls; and I don't think anybody can contend that possession of salmon fishings should be exactly the same in character below and above the falls. Practically, the fishings below the falls, which belonged partly to the monks and partly to Lord *Lovat*, are the most valuable part of the fishings, and they will be far more productive probably than the fishings above the falls. But this view is intensified when you look at the circumstances under which the fishings were really possessed. Not only were there falls which made it difficult for salmon to ascend except in floods, but there were immediately below the falls two sets, I think, of salmon cruives, and these were very deadly to the salmon, and very few comparatively got up; and the case becomes still stronger when we see that, besides using cruives, which was quite within his right, the Lord *Lovat* of these times seems to have narrowed the yairs and the meshes of the net to an extent greater than the law allowed. It is said that this was illegal, and so it was; but its illegality does not make it the less an important element in shewing what the possession was. Practically the result was that Lord *Lovat*, by means of these cruives with the additional assistance of the illegal meshes, could take all the salmon he wanted below the falls instead of going up above them; as expressed in argument, he took his crop of salmon at that point, but the crop he took there was that of the whole river. That, whether legal or not, is perfect possession of the whole river; and if there had been anybody above who had right to the salmon, it is impossible to imagine that they would have remained passive and not objected to that mode of dealing with the salmon in this river. It is a valuable salmon stream, and if it belonged to different proprietors, upper and lower heritors, or even to the Crown, I think it may be said that they never interfered in the least with the entire possession which Lord *Lovat* and his ancestors had of the whole salmon upon this river. I have come without difficulty to the conclusion that there is here a possession and title sufficient to give Lord *Lovat* the salmon fishings in this stream. But under his title I think Lord *Lovat* cannot claim the salmon fishings beyond the limits of his barony. It would require something very express in his title to give him a right to fishings locally situated it may be in another man's barony, or at all events in another man's lands, and separately I do not think there is sufficient proof of possession outside the Defender's barony.

But from this it follows that the Lord Advocate is right on the subordinate point, and that there should be such an alteration in the interlocutor as will prevent its being at any time contended

H. L. (Sc.) 1880 LORD ADVOCATE v. LORD LOVAT. Lord Blackburn.

that it is *res judicata* that the Crown has no right to grant the salmon fishings *ex adverso* of the parts of the barony of *Comarmore* which come down to the river. I do not think it necessary to inquire whether possession by the Lords *Lovat* of the fishings in the barony of *Comarmore* from time immemorial could have explained these titles so as to embrace more than was within the barony of *Lovat*, for no evidence sufficient to raise that question is given.

Ordered and adjudged, *that the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the 7th (signed 13th) of March, 1879, complained of in the said appeal, be, and the same is hereby affirmed, with this qualification, that after the words "Quoad ultra sustain the defences," there be inserted the following words, "without prejudice, however, to any right of the Crown, or its grantees, to the salmon fishing ex adverso the lands of the ancient barony of Comarmore:" and it is* Ordered *that the said cause be and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment: And it is further* Ordered, *that the Appellant do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal.*

Lords' Journals, 22nd February, 1880.

Agent for Appellant: *T. W. Gorst.*
Agents for Respondent: *Grahames, Wardlaw, & Currey.*

[HOUSE OF LORDS.]

HOULDSWORTH . . . . . APPELLANT;
CITY OF GLASGOW BANK AND LIQUIDATORS . . . . . } RESPONDENTS.

H. L. (Sc.)
1880
March 12.

Joint Stock Company—Action by Shareholder against the Company in Liquidation for Damage caused by Fraudulent Misrepresentations of Directors inducing him to purchase Shares.

A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it: his *only* remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by the winding-up of the company or by any other means—his action for damages is irrevelant, and cannot be maintained.

H. bought from the *City of Glasgow Bank*, a co-partnership registered under the *Companies Act*, 1862, £4000 of its stock in February, 1877.

He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October, 1878, with immense liabilities: and *H.* was entered on the list of contributories, and paid calls. In December, 1878, *H.* raised an action against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding-up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum*:—

Held, affirming the decision of the Court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325), and *Tennent* v. *City of Glasgow Bank* (4 App. Cas. 615), they afforded no ground for an action against the liquidators; therefore the action was irrelevant.

APPEAL against a judgment of the Court of Session in *Scotland*.

The *City of Glasgow Bank* was an unlimited company, incorporated and registered under the *Companies Act*, 1862, and had by virtue of its articles of co-partnership power to deal in its own shares.

H. L. (Sc.) 1880 — HOULDSWORTH v. CITY OF GLASGOW BANK.

In February, 1877, *Arthur Hooton Houldsworth*, the Appellant, purchased £4000 of the bank stock, from the bank itself, at the price of £9000. He was duly entered as a partner in the register of members; received dividends; and continued to be a partner ever since.

On the 2nd of October 1878, the bank stopped payment; and never resumed business. And on the 22nd of the same month an extraordinary resolution to wind up the bank was passed; and liquidators were appointed. The Appellant was entered on the list of contributories, and paid calls.

On the 21st of December, 1878, he raised this action against the bank and its liquidators to recover damages in respect of (1.) £9046 5*s.* 3*d.*, the price of stock and stamp duty; (2.) the sum of £20,000, being loss sustained by him through paying the amount of the first call; and (3.) the sum of £200,000, the estimated amount of future calls which may be made upon him. And he founded his claim on the ground that he was induced to buy the £4000 stock by means of the fraudulent misrepresentations and concealments of the manager, and directors. In his form of action he did not attempt to obtain rescission of the contract and restitution, even in a question *inter socios*.

The Lord Ordinary (1) assoilzied the Respondents from the conclusions of the summons; and stated in his note that he was of opinion that the case was ruled by the decision of this House in *Addie* v. *Western Bank* (2).

On a reclaiming note against the Lord Ordinary's interlocutor, the First Division of the Court of Session, on the 4th of July, 1879 (Lord *Shand* dissenting), dismissed the Appellant's action as irrelevant (3).

Feb. 16, 17. *The Lord Advocate* (Right Hon. *W. Watson*), and Mr. *Herschell*, Q.C. (with them Mr. *Romer*), contended, for the Appellant, that the principal was liable for the fraud of his agent acting within the sphere of his business; and that that was equally the case where the principal was an incorporated company

(1) Lord *Rutherfurd Clark*.
(2) Law Rep. 1 H. L., Sc. 145.
(3) Court of Sess. Cas. 4th Series, vol. vi. p. 1164; Scot. Law Rep. vol. xvi. p. 700.

acting through its directors, and, therefore, prior to liquidation the company here were liable, in respect of the fraud of the directors, to make reparation for the loss suffered by the Appellant. See *Barwick* v. *English Joint Stock Bank* (1); *Mackay* v. *Commercial Bank of New Brunswick* (2), approved in *Swire* v. *Francis* (3); see also *Denton* v. *Great Northern Railway Company* (4); *Swift* v. *Winterbotham* (5); *dictum* of Lord *Coleridge* in *Swift* v. *Jewsbury* (6); *Weir* v. *Bell* (7), affirming *Weir* v. *Barnett* (8); opinion of Lord *Cranworth* in *Reedie* v. *London and North Western Railway Company* (9); of *Holt*, J., in *Hern* v. *Nichols* (10); also of *Parke*, B., in *Cornfoot* v. *Fowke* (11); and also *Bell's* Com. (7th ed.), 1, 6, 14; *Clark* on Partnership, vol. i. p. 257; *Jardine* v. *Carron Company* (12); *National Exchange Company of Glasgow* v. *Drew and Dick* (13), which last case was distinguished from *Burnes* v. *Pennell* (14), affirming *Forth Main Insurance Company* v. *Burnes* (15); *Traill* v. *Smith's Trustees* (16); *Clyesdale Bank* v. *Paul* (17). The Respondents relied on *Addie* v. *Western Bank* (18), but the argument in that case before the House was chiefly on the question of rescission of the contract; see report (19), and one of the chief differences between that case and this was that there, subsequently to *Addie's* purchase, but before he had made any claim for either restitution or damages, the bank was changed from an ordinary joint stock company to an incorporation. And Lord *Cranworth* seemed to have rested his opinion on that peculiar circumstance, being of opinion that the new incorporation did not take over the liabilities for claims of damages against the former company founded on the fraud of its officials. The committee of the Privy Council in

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 5 P. C. App. 394, and at pp. 410, 412.
(3) 3 App. Cas. 106, at p. 114.
(4) 5 E. & B. 860. 2 Jur N S 185
(5) Law Rep. 8 Q. B. 244.
(6) Law Rep. 9 Q. B. 301, at p. 312.
(7) 3 Ex. D. at p. 238.
(8) Ibid. p. 32.
(9) 4 Ex. 244, at p. 255.
(10) 1 Salk. 288.
(11) 6 M. & W. 358, at p. 373.
(12) Court of Sess. Cas. 3rd Series, vol. ii. p. 1101.
(13) 2 Macq. 103.
(14) 2 H. L. C. 497; 6 Bell's App. 541.
(15) Court of Sess. Cas. 2nd Series, vol. x. p. 689.
(16) Court of Sess. Cas. 4th Series, vol. iii. p. 770.
(17) Court of Sess. Cas. 4th Series, vol. iv. p. 626.
(18) Law Rep. 1 H. L., Sc. 145.
(19) Law Rep. 1 H. L., Sc. at p. 148.

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK.

Mackay v. *Commercial Bank of New Brunswick* (1) held that *Addie* v. *Western Bank* (2) was decided upon that fact, which did not arise in the case before them or in *Barwick* v. *English Joint Stock Bank* (3); and, further, the Committee approved of Lord *Cranworth's* observation "that if by the fraud of the company's agent third parties have been defrauded, the corporation may be made responsible to the extent to which its funds have been benefited;" and here the bank had been largely benefited, for when the Appellant purchased the shares if the true state of the bank had been known they would have been worth less than nothing. Then Lord *Chelmsford*,—the only other Law Lord who decided *Addie's* case,—based his judgment exclusively on the right to rescind, and therefore did not take the same view of the case as Lord *Cranworth*. Also, though Lord *Chelmsford* remarked that an action of deceit does not lie against a company for the fraud of its directors, that remark was inconsistent with other parts of his judgment, where he concedes (*a*) that the fraudulent representations of the directors of such a company are imputable to the company, and (*b*) that the company can retain no benefit which it has derived from them. Those two points covered the whole contention and were sufficient for the Appellant's case.

They further maintained that the defrauded partner had his choice of reducing the contract, into which he was led by fraud; or of claiming damages without reducing the contract; for see *Amaan* v. *Handyside* (4); *Lindley* on Partnership [4th ed.], pp. 717, 923; *Sedgwick* on Damages [4th ed.], p. 339; Stair, Inst. 1, 9, 14. And dealing with a going company, was there any principle in law which would make the action for damages inapplicable?

[EARL CAIRNS, L.C.:—I quite understand why such an action should not be applicable: on your becoming a shareholder you must have divorce, or cannot have compensation.]

On general principle one can retain the shares, and yet get damages.

[EARL CAIRNS:—During the last quarter of a century the

(1) Law Rep. 5 P. C. App. 394, at p. 410, 413.

(2) Law Rep. 1 H. L., Sc. 145.

(3) Law Rep. 2 Ex. 259.

(4) Court of Sess. Cas. 3rd Series, vol. iii. p. 526.

Courts have been inundated with cases of this kind; and yet there is no case where such a contention has been put forward.]

Because rescission is more appreciable, and more sought for.

Then having this alternate right before liquidation, they submitted liquidation did not extinguish the liability, but it was enforceable by an action against the liquidators. Liquidation was not the repudiation of the debts and liabilities, but on the contrary was the ascertainment of the amount of such; see opinion of Lord *Chelmsford* in *Waterhouse* v. *Jamieson* (1); and Lord *Cairns* in *In re Duckworth* (2).

It could not be said that the liquidators had not sufficient means of satisfying the Appellant's claim, for the old shareholders had not yet been called upon. Therefore, it followed that though the winding-up put an end to rescission and restitution, *Oakes* v. *Turquand* (3), the right of an action for damages remained; see *dictum* of *Lindley*, J., in *Stone and Collins* v. *City and County Bank* (4), where he decided against the plaintiffs on the express ground that they had not brought their action for damages; see also the *dicta* of *Bramwell*, L.J., *Brett*, L.J., and *Cotton*, L.J., in that case on appeal (5).

It was not inconsistent that the Appellant should have damages against the company of which he was a member; nor that he should have to pay a share towards his own damages. The Act of 1862, sects. 158, 131, expressly provided for the proof against the company of the debts of all descriptions including damages; also such a claim as the Appellant's was sanctioned, or at least not prejudiced by sect. 38, sub.-sect. 7. There was no limitation to a case of fraud, therefore the Appellant's remedy was not limited to rescission. He was entitled to claim in the liquidation, though himself being a member he would be liable to pay calls *pro tanto* with the other members; but he was in the claim for damages to be regarded as an independent person, quite apart from his character as a partner. See also, beside cases previously cited,

(1) Law Rep. 2 H. L., Sc., at p. 37.
(2) Law Rep. 2 Ch. App. at p. 580.
(3) Law Rep. 2 H. L. 325.
(4) 3 C. P. D. 282, at p. 299.
(5) Ibid. at p. 306.

H. L. (Sc.) 1880

HOULDSWORTH v. CITY OF GLASGOW BANK.

New Brunswick Company v. *Conybeare* (1); *Ranger* v. *Great Western Railway Company* (2); *Scholefield* v. *Templer* (3).

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Balfour* appeared for the Respondents; but were not called upon to address the House.

The Law Peers having considered their judgment, delivered the following opinions:—

March 12. EARL CAIRNS, L.C.:—

My Lords, in this case the Appellant bought from the *City of Glasgow Bank* £4000 of its stock in February, 1877, paying £9000 for it. He was registered as a partner, received dividends, and otherwise acted as a partner. When the bank went into liquidation in October, 1878, he was entered on the list of contributories, and has since then paid very large sums for calls. On the 21st of December, 1878, he commenced the present action against the liquidators to recover damages in respect of the sum he had paid for shares and the moneys he has since paid for calls, and he founds his right to relief upon the ground of fraudulent misrepresentations made by the directors and others connected with the bank, for whose representations he alleges the bank was answerable.

As the question is one of relevancy, I will assume that the allegations of fraudulent misrepresentations are such as that if the bank had been a going concern the Appellant would have been entitled to rescind his contract and to have recovered back all sums paid in respect of his shares. The Court of Session has been of opinion that even although the averments amount to what I have stated, still they afford no ground for an action against the liquidators, and they have dismissed the action with costs. In my opinion the Court was right.

It was admitted before your Lordships, as indeed it could not be denied, that after the winding-up of the company commenced it was too late for the Appellant to repudiate his stock, and that

(1) 9 H. L. C. 711. (2) 5 H. L. C. 72.
(3) 26 Ch. 155; 28 L. T. (Ch.) 452.

he must remain, as the liquidation found him, a partner in the bank and a contributory as such. It also came to be admitted in the course of the arguments at your Lordships' Bar that if the Appellant, remaining a partner, had a right to raise an action for damages against the liquidators after the winding-up, he must also have had a right before the winding-up to have remained a partner, and also then to have brought an action for damages. It appears to have been contended in the Court below that the Appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied. In the argument at your Lordships' Bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. The *Winding-up Act* has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter.

The question, therefore, mainly argued at your Lordships' Bar, and upon which the decision of this case must, as I think, depend, was this: Can a man, induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares, and to sue the company for damages?

There is no doubt that according to the law of *England* a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. I will assume, although no distinct authority has been produced, and I do not wish to express a decided opinion upon it, that the law of *Scotland* in the case of a chattel or of goods is the same as that of *England*.

But does the same rule apply to the case of shares or stock in a

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Earl Cairns, L.C.

partnership or company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way.

Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?

It may go some way to answer this question to observe that, although during the last quarter of a century actions in every shape and form have been brought or attempted to be brought arising out of dealings in shares alleged to have been fraudulent, no case could be mentioned at the Bar in which an action for damages has been sustained, the Plaintiff retaining his position in the company. A few *dicta* were referred to, but they were of so vague and hypothetical a character that they are not deserving of further examination.

I will, however, ask your Lordships to look at the case on principle.

A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000, and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them, whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. This is

the contract, and the only contract, made between him and his partners, and it is only through this contract, and through the correlative contract of his partners with him, that any liability of him or them can be enforced.

It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions, shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his co-partners, in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered.

He finds out, however, after he joins the company, that the liabilities were not £100,000 but £500,000. He is entitled thereupon, as I will assume, to rescind his contract, to leave the company, and to recover any money he has paid or any damages he has sustained; but he prefers to remain in the company and to affirm his contract, that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities. He then brings an action against the company to recover out of its assets the sum, say £4000, which it will fall upon his share to provide for the liabilities, over and above what his share would have had to provide had the liabilities been as they were represented to him. If he succeeds in that action, this £4000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4000 could not be reckoned. The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law.

My Lords, whatever differences may be pointed out between this

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK.

case and the case of *Addie* v. *The Western Bank* (1) in this House, I think the *ratio decidendi* in that case would go far, if it did not go the whole way, to decide the present appeal. But I entertain no doubt, for the reasons I have stated, that on principle, irrespective of authority, the decision of the Court of Session was right. I will move your Lordships to dismiss the appeal with costs.

LORD SELBORNE:—

My Lords, the principle on which the cases of *Barwick* v. *The English Joint Stock Banking Company* (2), *Mackay* v. *Commercial Bank of New Brunswick* (3), and *Swire* v. *Francis* (4) (relied upon the Appellant), were decided, was thus stated by Mr. Justice *Willes* in the former of those cases, and repeated (from his judgment) by the Judicial Committee in the two latter: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit," because, although the master may not have authorized the particular act, "he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases.

That principle received full recognition from this House in *The National Exchange Company* v. *Drew* (5) and *New Brunswick Railway Company* v. *Conybeare* (6), and was certainly not meant to be called in question by either of the learned Lords who decided *Addie* v. *The Western Bank of Scotland* (1). It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the

(1) Law Rep. 1 H. L., Sc. 145.
(2) Law Rep. 2 Ex. (Ch.) 259.
(3) Law Rep. 5 P. C. 394.
(4) 3 App. Cas. 106.
(5) 2 Macq. 103.
(6) 9 H. L. C. 711.

ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice *Willes* in *Barwick's Case* (1)), "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose.

In the greater number, probably, of cases of this kind the question whether the fraud or other wrongful act of an agent could itself properly be imputed to his principal is not material; the liability of the principal to the third party, when properly measured by damages, being practically the same, whether he was privy to the wrongful act or not.

Sir *Montague Smith* in *Mackay* v. *Commercial Bank of New Brunswick* (2), criticised (perhaps justly) some expressions which fell from Lord *Cranworth* in this House in the two cases of *Conybeare* and *Addie*, particularly in the latter case, in which Lord *Cranworth* said that "an incorporated company cannot, in its corporate character, be called on to answer in an action for deceit." The sequel of Lord *Cranworth's* words appeared to me to shew that in using these expressions (perhaps technically inaccurate) he had substance, and not form, in view. In the old forms of common law pleading fictions were not seldom allowed, but not so as in the result to make the rights or remedies of the parties depend on the fiction rather than on the law applicable to the real facts which were allowed under those forms of pleading to be given in evidence. In *Barwick's Case* (1) a corporation was directly charged with fraud upon the pleadings (no mention being made of agency) and an objection taken on that ground was treated by Mr. Justice *Willes* as technical. "If" (he said) "a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is

(1) Law Rep. 2 Ex. (Ch.) 259. (2) Law Rep. 5 P. C. at p. 410.

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Lord Selborne.

sought to be made answerable in the action." And all that was laid down by Sir *Montague Smith* in *Mackay's Case* (1) itself was, that there might be cases in which to work out the appropriate remedy against a principal who had "profited by the fraud of his agent," the form of action, technically called "an action of deceit," might be either necessary or convenient; that very learned Judge saying expressly that "the time had passed when much importance was attached to mere forms of actions;" and that "an action of deceit might be maintainble in which the fraud of the agent might be treated, for purposes of pleading, as the fraud of the principal."

In Equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as the ground of relief, though the law of agency was administered according to the same rules in Equity as at Common Law, and though in Equity, as well as at law, an innocent principal might suffer for the fraud of an agent. Vice-Chancellors *Knight Bruce* and *Parker*, and Lord Chancellor *Campbell* (all very eminent Judges) said (as Lord *Cranworth* and Lord *Chelmsford* also said in this House), that the law does not impute the fraud of directors to a company; and the same proposition would, I apprehend, be equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation but an individual. The real doctrine which Lord *Cranworth*, in *Addie's Case* (2), meant (as I understand him) to affirm was one of substance and not of form: "An attentive consideration" (he said) "of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

(1) Law Rep. 5 P. C. 394. (2) Law Rep. 1 H. L., Sc. 145.

The words in this passage "to the extent to which the companies have profited by those frauds" may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in the case of *Addie*) there would be a miscarriage of justice if the distinction which it involves were not attended to. This is not a case of parties at arm's length with each other, one of whom has suffered a wrong of which damages are the simple and proper measure, and which may be redressed by damages without any unjust or inconsistent consequences. For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger; except that he may have to contribute, rateably with others, towards the payment of his own claim. But here it is impossible to separate the matter of the Pursuer's claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it. His complaint is, that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. The loss from which he seeks to be indemnified by damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company; and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders (as long as it remains unrescinded) that they should all contribute equally to the payment of all the company's debts and liabilities.

Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the Pursuer; it is to throw upon them the Pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord *Cranworth* in *Addie's Case* (1)) may have come and probably did come into the company after the Pursuer had acquired his shares. They are all as innocent of the fraud as the Pursuer himself; if it were imputable to them it must, on the same principle, be imputable to

(1) Law Rep. 1 H. L., Sc. 145.

H. L. (Sc.) 1880 — HOULDSWORTH v. CITY OF GLASGOW BANK. — Lord Selborne.

Pursuer himself as long as he remains a shareholder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is in my opinion the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the Appellant is confessedly too late.

I will not enlarge further upon the reasons for this conclusion, which I know will be more fully explained by others of your Lordships. But I must add that I think the Court of Session was right in holding the present question concluded by *Addie's Case* (1). The only difference between *Addie's Case* and the present is this, that the *Western Bank of Scotland* was formed under 7 Geo. 4, c. 67, by which it was enabled to sue, and liable to be sued (upon all causes of action for which the shareholders for the time being were answerable) by its public officer; and it continued in that state till after the alleged frauds had been committed, so as to give a cause of action to the Pursuer, Mr. *Addie*. The subsequent registration, under 20 & 21 Vict. c. 49, s. 8, was in my judgment sufficient to transfer from the unregistered to the registered company all liabilities upon any cause of action whatever for which the unregistered company might have been sued by its public officer immediately before the registration. I do not understand that there was really any difference between Lord *Chelmsford* and Lord *Cranworth* in that case; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of Lord *Cranworth*, in that part of his judgment which relates to the question of damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean that even if the unregistered company had been liable to be sued for damages, by its public officer, down to the time of registration, that liability would not have been among the "debts and obligations" transferred by 20 & 21 Vict. c. 49, s. 8, to the registered company. Lord *Cranworth* was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said unreasonable)

(1) Law Rep. 1 H. L., Sc. 145.

construction upon such words in such a statute. He made, to my mind, his real meaning plain by what he went on to say; from which it is apparent that if the *Western Bank* had been incorporated before, and not after, the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages. And that, my Lords, is precisely the present case.

LORD HATHERLEY:—

My Lords, I agree in the conclusions that have been arrived at by those of your Lordships who have addressed the House in this case.

I think that the following points may be considered as concluded by authority; at all events I shall assume them so to be for the purposes of the case before the House. First, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. Secondly, that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. Thirdly, that, if there cannot be a *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived.

My Lords, in this case it may be assumed for the present purpose that the contract is one which was obtained by fraudulent misrepresentation on the part of an agent or agents of the *City of Glasgow Bank*, whereby the Appellant was led to purchase shares in that bank as though it were a profitable going concern, whereas it was in fact hopelessly insolvent, purchasing the privilege of becoming a shareholder, if it were a privilege, or, rather, as it turned out, acquiring that unfortunate position, for the sum of

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Lord Hatherley.

£9000. In about a year and a quarter after this purchase had been made the bank was in liquidation, and the Appellant alleges that he has already contributed £20,000 towards the debts of the company, and also that he is liable to an extent which he puts in his condescendence as being possibly about £200,000 more in respect of the debts of the concern. He asks as a remedy to recover the sum that he paid for his shares, less certain small deductions mentioned in the case, and also to be indemnified as to the payment of the £20,000 and the possible future liability. This remedy he asks for as against the company, of which at the time of the bank going into liquidation he was a member or partner, and from which partnership he has never been discharged.

The main point in the case is whether he should be allowed to proceed further in such an action, that is to say, the question arises on relevancy in reference to the remedy which this gentleman seeks to obtain with regard to the injury which he says has been done to him. The Lord Ordinary held that the case was concluded by *Addie's Case* (1), and the same view was entertained by three of the Judges in the Court of Session. The principal difference between the present case and that of *Addie* is that in *Addie's Case* (1) the company was not incorporated at the time of the purchase, but became so before the liquidation, whereas in the present case the company was incorporated before the time when the purchase was made by the Appellant, and he became a shareholder. In the view which I take of the case, I do not consider that difference to be one which should render relief possible in this case, if it was proper to withhold it in the case of *Addie*. It appears to me to be fatal to the Appellant's right to the relief he asks that he is still, or was at the date of the liquidation, a shareholder in the company against which he asks it. No case has been cited in which such a remedy as that sought by the Appellant in the present case has been allowed to take effect by any Court either in *Scotland* or in *England*.

What became the position of the Appellant when he had paid his money in respect of the transfer of shares into his name? He thereby became on the one hand entitled to any profits made by the employment of the capital of the company according to the

(1) Law Rep. 1 H. L., Sc. 145.

proportion which his shares bore to all the other shares in the company. And at the same time he undertook to bear a like aliquot share of all the debts and liabilities of the company incurred, or to be incurred, in respect of the business which the company was carrying on. Amongst the debts would be (if the Appellant be right) the debt due to himself in respect of the damage sustained by him through the wrongful act of the company in inducing him by misrepresentation to place himself on the list of shareholders. It appears that he did draw dividends (I think three) of alleged profits out of the concern.

Now suppose, and I fear from other cases that have come before your Lordships' House the supposition is by no means an improbable one, suppose I say that there should be some ten or twelve other shareholders in a like position with the Appellant with regard to purchasing shares under misrepresentation on the part of the company's agents, some of them having purchased shares before him and others after him; those ten or twelve shareholders would each of them have the same claim in respect of damages against the company (except in each case the party suing) as is now claimed by the present Appellant. The present Appellant would by his partnership contract have to bear his aliquot share of the damages that might be claimed by other misled shareholders who had been placed on the list by the same course of misrepresentation as himself. What end would there ever be to the interlacing claims on the part of misled shareholders *inter se* as to dividends received whereby the fund which might have been applied towards recouping and making good the debts of the company, including the damages claimed by the Appellant, was diminished? How could they be retained by the Appellant as against his fellow sufferers? He would clearly have to account for them as between himself and his fellow sufferers who would be claiming relief on the same grounds as himself.

In truth the Appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before the Courts in respect of dealings with joint stock companies, no case

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Lord Hatherley.

can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of represensations made by their common agent.

Some clauses in the *Companies Act* were cited in the course of the argument as shewing the rights *inter se* on the part of shareholders of a company by which they were all to be brought into equality one with another when the settlement took place and arrangements for winding up were made by the liquidators. Those provisions as to liquidation for the purpose of equalizing the contributions of contributories *inter se*, do not appear to me to authorize such a scheme or contrivance as would be necessary in this case to effect the object proposed by the Pursuer. Having omitted to obtain a rescission of the contract, he would have to make a complicated inquiry such as I have described as between himself and other shareholders who could put themselves in the same position as himself as regards misrepresentation by the common agent; and nothing has been pointed out in the Act which leads to the supposition that any such inquiry as that was contemplated. What has really happened is this—he has had the misfortune, together with others, as I have said, in all probability, though that is not in evidence in this case, of being misled by the representations of the agent of the company. If your Lordships were to establish a precedent in his case there would probably be other claimants also, each of whom would have a claim which, it appears to me, could not be dealt with after the time for the rescission of the contract had gone by. If the Appellant obtains the relief he has sought, every other shareholder in the same position as himself might come forward to claim a similar relief. What has really happened is that both he and those other shareholders in a like position, have suffered from the misfortune of having employed a dishonest agent. As between third parties to the company and the Appellant, he might well be entitled to rescission of the contract whereby he became a shareholder, but, if time and circumstances have prevented that remedy and he must remain a shareholder,

I do not see how he can escape the burden occasioned by the common misfortune of himself and many of the other shareholders in having employed dishonest agents. I therefore feel that whatever rights this gentleman may have acquired in the first instance, his case has been rendered hopeless by what has taken place since, by reason of which it has been placed beyond his power to put things in such a position that his name can be struck off the share list altogether, in which case he would, according to some of the authorities which have been cited, have stood in the position of a stranger with reference to misrepresentations made by agents of the company.

I agree with the order which has been proposed to your Lordships by my noble and learned friend.

LORD BLACKBURN :—

My Lords, I also think that it is not necessary to hear the counsel for the Respondents, as after carefully considering the judgments below, and the arguments of the Appellant's counsel, I have come to the conclusion that the interlocutor appealed against was right, and that the appeal should be dismissed with costs.

The Lord Ordinary based his judgment on this short ground :— "The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Addie* v. *The Western Bank* (1);" and that, if correct, was a sufficient ground for his decision. For when it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this House, to say that the *ratio decidendi* was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the facts in the case then under discussion and those in the case on which the decision in the House of Lords proceeded are so material as to prevent his case from falling within the *ratio decidendi* of the House, even though the opinions of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion; for unless those differences in fact did exist in the case in this House, or at least

(1) Law Rep. 1 H. L., Sc. 145.

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Lord Blackburn.

the possibility of their existence was prominently brought forward, I think the House cannot be taken to have decided that such differences in fact might not make a material distinction in law.

I think, therefore, that it is important to inquire what are the differences of fact between this case and that of *Addie* v. *The Western Bank* (1), and then to determine whether they do make a material distinction in law.

The *Western Bank* was a co-partnership carrying on the business of banking in *Scotland* under the provisions of 7 Geo. 4, c. 67. Whilst this was so, *Addie* entered into a contract with persons who were, though he did not know it, agents for the *Western Bank* to purchase shares in that bank. *Addie* paid to the agents of the bank the agreed consideration, and accepted shares, which in fact belonged to the bank, and in respect of them became a partner on the terms contained in the partnership deed of the *Western Bank*. Some time elapsed, and the *Western Bank* becoming insolvent stopped payment. Then advantage was taken of the provisions of the *Joint Stock Banking Companies Act*, 1857 (20 & 21 Vict. c. 49) s. 6, and it was resolved by a majority of the shareholders to register the *Western Bank* as a company, other than a limited company, under the provisions of the *Joint Stock Companies Act*, 1857. *Addie* was a party to this resolution. The *Western Bank* after registration was wound up. *Addie* was made a contributory, and he and such of the other contributories as were solvent paid calls, by means of which all the creditors were paid, and some surplus existing had to be returned to the contributories who had paid. Then, and not till then, *Addie* commenced his action in the Court of Session.

The interlocutor appealed against, which was reversed, was that of the 2nd of February, 1864: "That the Pursuer had stated matter relevant to go to trial."

The following appear to me to be the material statements in the case now before this House. The *City of Glasgow Bank* was originally, like the *Western Bank*, a co-partnership carrying on business in *Scotland* under the provisions of 7 Geo. 4, c. 67. The deed of co-partnery of this bank did not in any material respect

(1) Law Rep. 1 H. L., Sc. 145.

differ from that of the *Western Bank*. But whereas the *Western Bank* was registered under the provisions of the *Joint Stock Banking Companies Act*, 1857, after *Addie* had entered into the contract in respect of which he raised his claim, the *City of Glasgow Bank* was registered under the *Companies Act*, 1862, on the 29th of November, 1862, several years before the date of the transactions in respect of which the Pursuer raises his claim; and the Pursuer knew that he was purchasing shares the property of the bank, and dealing with the agents of the bank, whilst *Addie* was not aware of these facts; and this action was commenced earlier than that of *Addie*. It was commenced after the liquidation had begun, but before it was ascertained how much the solvent contributories would have to pay, or who would be solvent contributories.

I do not observe any other differences between the statements in the case now under discussion and the statements in the case of *Addie* v. *The Western Bank* (1). And as I think that those differences of fact make no distinction in law, and as the interlocutor appealed against in this case seems to me identical in effect with that pronounced by this House, I agree with the Lord Ordinary that this case is ruled by the decision of the House in *Addie* v. *The Western Bank*.

But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' Bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint stock company to take shares in that company is a very peculiar one. Whether the company be, as the *Western Bank* was, a banking co-partnership in *Scotland* under the 7 Geo. 4, c. 27, having such a deed of co-partnership as that bank had, or a joint stock company registered under the *Companies Act*, 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his co-partners for the time being, contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that any one of his co-partners may, by procuring a person to take his shares, get rid (at least *inter socios*) of his lia-

(1) Law Rep. 1 H. L., Sc. 145.

H. L. (Sc.) 1880

HOULDSWORTH v. CITY OF GLASGOW BANK.

Lord Blackburn.

bility, substituting that of the incoming shareholders. I know of no other contract which in these respects resembles this contract.

It was with this peculiar kind of contract that the House of Lords had to deal in *Addie* v. *The Western Bank* (1), and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decision in *Addie's Case* (1) from governing such a case as that.

I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the Civil Law, when there is *dolus dans locum contractui*, the contract is not void but only voidable. And it follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind. But though he cannot rescind he may, at least in English law, as against the person actually guilty of the fraud, recover damages (*Clarke* v. *Dixon* (2) and *Cole* v. *Bishop*, mentioned in that case by Justice *Erle* (3)). The Lord President in this case says, that the deceived party may rescind if the fraud inducing the contract was that of an agent acting in the principal's business and within the scope of his authority, though the principal was ignorant of the fraud, and free from all moral guilt, or even, being an incorporation, was necessarily incapable of knowing anything except by its agents, and therefore free from all moral guilt (if such a phrase can be properly applied to an incorporated body), and so far I think the position is not disputed. But when he proceeds to say that "when the result of the fraud is the making of a contract between the party deceiving (not personally but through an agent) and the party deceived, I am not aware that any remedy is open to the latter, except a rescission of the contract, or at least without a

(1) Law Rep. 1 H. L., Sc. 145. (2) E. & B. 148.

(3) E. & B. at p. 153.

rescission of the contract," he states a proposition which is much controverted.

Lord *Shand* disputes it on principles and authorities of Scotch law well worthy of consideration, and then says:—

> The whole question has been very carefully considered in recent cases in *England*, in which it has been settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business intrusted to them: *Barwick* v. *The English Joint Stock Bank* (1); *Swift* v. *Winterbotham* (2); *Mackay* v. *The Commercial Bank of New Brunswick* (3); *Swire* v. *Francis* (4); *Stone and Collins* v. *The City and County Bank, Limited* (5); *Weir* v. *Bell* (6). I say nothing of *Udell* v. *Atherton* (7), except that it was the decision of a Court equally divided; that it was considered in most, if not all, of the subsequent cases just cited; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds.

Barwick v. *English Joint Stock Bank* (1) was decided just before the decision in *Addie* v. *The Western Bank* (8), and the noble and learned Lords who advised the House were not aware of that decision. I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question. The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Addie* v. *The Western Bank* (8), nor, as I think, whether it is overruled by that decision. *Mackay* v. *Commercial Bank* (3) was decided after *Addie* v. *The Western Bank* (8), and was distinguished from it. I do not think your Lordships need now inquire whether successfully or not.

But it seems to me that Lord *Chelmsford* did not lay down any general position as to all contracts. He says: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this—where a person has been drawn into

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 9 Q. B. 301.
(3) Law Rep. 5 P. C. 394.
(4) 3 App. Cas. 106.
(5) 3 C. P. D. 283.
(6) 3 Ex. D. 238.
(7) 7 H. & N. 172.
(8) Law Rep. 1 H. L., Sc. 145.

H. L. (Sc.) 1880 HOULDSWORTH v. CITY OF GLASGOW BANK. Lord Blackburn.

a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been *induced to purchase shares by the fraud of the directors*, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr. *Addie* is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

I cannot say whether Lord *Chelmsford* meant to confine his observation to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned Lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint stock company to contract with that company to become a partner in that company he can bring no action of deceit against the company whilst he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud, as for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind.

Lord *Cranworth* uses language applicable to all contracts; I cannot say whether he meant to apply the doctrine to all kinds of

contracts, however different from that with which he was dealing. I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is, that if such a case arises, the consideration of the question whether it is decided by *Addie* v. *The Western Bank* (1) is not meant to be prejudiced by anything I now say.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 12th March, 1880.

Agents for Appellant: *Simson & Wakeford.*
Agents for Respondents: *Martin & Leslie.*

(1) Law Rep. 1 H. L., Sc. 145.

Approved. NADARAJAN CHETTIAR *v.* MAHATMEE [1950] A. C. 481

[PRIVY COUNCIL.]

J. C.* 1879 Dec. 16.

JOSEPH TRIMBLE . . . . . PLAINTIFF;

AND

GEORGE HILL . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Wagering Contract—Right to recover Deposit from Stakeholder—14 *Vict. No.* 9, *s.* 8—*Construction.*

The Plaintiff deposited with the Defendant £200 to abide the event of a match between a horse of the Plaintiff and another horse belonging to *G.*; but before the day fixed for the race, he gave notice to the Defendant that he revoked the authority to pay over the money, and demanded the return of it:—

Held, that the Plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and therefore null and void under the Colonial Act, 14 Vict. No. 9, s. 8 (which is in the same terms as Imperial Act, 8 & 9 Vict. c. 109, s. 18). It was not an agreement to contribute a sum of money within the meaning of the proviso contained in the said section; which proviso applies to contributions other than wagers.

Diggle v. *Higgs* (1) approved.

Where a colonial Legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in *England*, such construction should be adopted by the Courts of the Colony.

APPEAL from a judgment of the Supreme Court (*Hargrave* and *Faucett*, JJ., *Martin*, C.J., dissenting) (Dec. 13, 1877), dismissing the Plaintiff's appeal from a judgment of the Metropolitan and Coast District Court at *Sydney* (April 16, 1877), with costs.

The facts are stated in the judgment of their Lordships.

Mr. *J. C. Barnes* (Mr. *J. C. Mathew* with him), for the Appellant, contended that the judgments of the Court below were erroneous. They proceeded on the ground that the money sought to be recovered had been contributed towards a sum to be paid to the winner of a lawful game within the meaning of the Colonial

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 2 Ex. D. 422.

Act, 14 Vict., No. 9, s. 8 (which is identical with the Imperial Act, 8 & 9 Vict. c. 109, s. 18), and that, therefore, the action would not lie. But that was at variance with *Diggle* v. *Higgs* (1). He submitted that the money sought to be recovered had been deposited under a contract which was not enforcible, and that, upon the revocation of the Defendant's authority to retain the money, the Defendant ought to have paid it back.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in an action brought by the Appellant, Mr. *Trimble*, to recover from the Defendant a sum of £200 deposited with him to abide the event of a match between a horse of the Plaintiff and another horse belonging to Mr. *Glenister*. The agreement under which the deposit was made, or so much of it as is material, is in these terms: "4th April, 1877. Mr. *Glenister* agrees to run *Gaffer Grey* against Mr. *Trimble's Beacon* for the sum of £500 a side, £200 of which is deposited in the hands of *George Hill*, which said deposit money will be forfeited unless the whole of the stake is made good on Monday evening, the 10th day of April, between the hours of 8 and 10 P.M." Before the day fixed for the race, the Plaintiff gave notice to the Defendant that he revoked the authority to pay over the money, and demanded the return of it. The question upon these short facts arises on the 8th section of the Colonial Act, 14 Vict., No. 9, which is in the same terms as the 18th section of the Imperial Act, 8 & 9 Vict. c. 109. The enactment is: "And be it enacted that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void, and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event in which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum

(1) 2 Ex. D. 422.

J.C. 1879 TRIMBLE v. HILL.

of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." This enactment annuls all contracts by way of gaming or wagering; thus abolishing the distinction between legal and illegal wagers, which had frequently raised vexed questions for the consideration of the Courts. All wagers, so far as actions to enforce them are concerned, are declared by it to be null and void. There can be no doubt that the contract in question is a contract by way of wagering; it is in fact a wager, as stated by the Chief Justice below, on one horse against the other. The only question is whether it is taken out of the operation of the general enactment by the proviso.

The meaning of this proviso has been considered in several cases in the English Courts. In the case of *Batty* v. *Marriott* (1), where an agreement analogous to the present was made and money deposited to abide the event of a foot-race, it was held that a foot-race being a legal pastime, the agreement was within the proviso. This decision did not meet with entire acquiescence when it was brought before the Courts in subsequent cases. It is unnecessary to refer to these cases, because the decision itself has been distinctly overruled by the Court of Appeal in the recent case of *Diggle* v. *Higgs* (2). In that case the agreement related to a walking match, and was to the same effect as that in the present action. It was decided that an agreement of this kind, being a contract of wager, was not an agreement to subscribe or contribute for or towards any prize or sum of money within the true meaning of the proviso, which it was held applied to subscriptions and contributions other than wagers. It is not disputed by the two Judges forming the majority in the Court below that this decision was directly in point, but their own opinions not agreeing with it, they declined to follow its authority.

Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in *England* are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it.

(1) 5 C. B. 819. (2) 2 Ex. D. 422.

The Judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of *Hogan* v. *Curtis* (1), but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle* v. *Higgs* (2), as the English Court which decided *Batty* v. *Marriott* (3) would have felt bound to do if a similar case had again come before it.

Their Lordships would not have felt themselves justified in advising Her Majesty to depart from the decision in *Diggle* v. *Higgs* (2) unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same. Their Lordships, however, do not dissent from, nor do they desire to express any doubt as to the correctness of that decision, which, it may be assumed, has settled the vexed question of the construction of a not very intelligible enactment.

The case of *Diggle* v. *Higgs* (2) also decided that the statute does not preclude the party who has revoked the authority given to the stakeholder from recovering the money he had deposited; the Court of Appeal agreeing with a previous decision to the same effect of the Court of Queen's Bench in *Hampden* v. *Walsh* (4).

Their Lordships find that by the Colonial Act, 22 Vict. No. 18, s. 94, the Supreme Court is empowered, upon an appeal from a District Court, to order judgment to be entered for either party; and they are of opinion, the facts being undisputed, that the judgment, for the reasons above given, should have been entered for the Plaintiff.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to direct that the nonsuit be set aside, and judgment entered for the Plaintiff for the sum of £200.

The Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Young, Jones, Roberts, & Hale.*

(1) 6 Sup. Court Rep. 292.
(2) 2 Ex. D. 422.
(3) 5 C. B. 819.
(4) 1 Q. B. D. 189.

[PRIVY COUNCIL.]

J. C.*

1879

July 29; *Dec.* 16.

Ex parte CHARLES NICOLLE.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Curatelle—Person—Property.

By the law of *Jersey* in order to place a man under "*curatelle*" the Court must be satisfied not merely that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. To establish the intemperance the Court must not merely have the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure is adopted for the removal of the interdiction and the re-instatement of the party in his civil rights.

When the Court is satisfied that the interdiction should be reversed as regards the person, it has no power to continue the "*curatelle*" as regards the property upon a mere suggestion that it would be better and more expedient for the family so to do.

THIS was an application for special leave to appeal from certain orders of the Royal Court of *Jersey*, dated the 28th of December, 1878, and the 22nd of May, 1879, the nature of which appears in the judgment of their Lordships, to which the reader is also referred for the facts of the case. In the alternative it was prayed that the merits of the case might be inquired into on the hearing of the petition by way of *doléance*, and that the orders might be reversed or varied, and that the Petitioner might be reinstated in the management of his property.

Mr. *Millar*, for the Petitioner.

July 29. Their Lordships observed that they would advise Her Majesty to treat the petition as a *doléance* and to require the Royal Court to make a return thereon.

On the 5th of November, 1879, the Royal Court made a return as directed.

* *Present*:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

J. C.
1879
Ex parte NICOLLE.

On the 16th of December, 1879, the case came again before their Lordships.

Mr. *Millar*, for the Petitioner.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This case comes before their Lordships on the petition and *doléance* of Mr. *Charles Nicolle*, of *St. Heliers* in *Jersey*. It appears that in 1867 the Royal Court of *Jersey* appointed a "*curateur*" of the person and property of the Petitioner on the ground that he was a person of intemperate and prodigal habits. It must be assumed that all the proceedings in the case were duly had, and that the order was made in accordance with the law of *Jersey*, which will be afterwards considered. On the 9th of November, 1878, he presented a remonstrance to the inferior number of the Royal Court, stating that the reasons for his interdiction had ceased to exist, and that he was then perfectly fit to have the care of his own person and the management of his property, and praying that this *curateur*, the persons named as the surviving electors of the *curatelle*, and also a sufficient number of the principal inhabitants of the parish of *St. Heliers* where the Petitioner was domiciled, should be duly summoned, in order that in the presence of the said *curateur* and of the said electors, and after having heard the said principal inhabitants (*les dits principaux*), the Court might be pleased to annul the said "*curatelle*," to "*rehabilitate*" the remonstrant, and to restore him to the enjoyment of all his civil rights, and for such other relief as the Court should consider that the case deserved.

The Court proceeded to summon these persons, the evidence of the principal inhabitants was taken in the usual way, and it certainly went to establish that the habits of the Petitioner were reformed, and that he was of sound mind; but the Court came to the conclusion that although a proper case for releasing his person from the *curatelle* had been established, there was ground for maintaining the *curatelle* so far as it related to the administration of his property. The order, which bears date the 28th of December, 1878, is in these words: "*Après avoir entendu par le moyen de*

J. C. 1879 *Ex parte* NICOLLE.

son Avocat, et conformément aux conclusions dudit Sieur Procureur Général de la Reine, paraissant que la conduite dudit Sieur Charles Nicolle est depuis quelque temps devenue telle qu'il est apte à avoir le libre soin de sa propre personne, mais qu'il n'est pas suffisamment établi qu'il y ait lieu de la réintégrer dans l'administration de son biens; qu'en conséquence il y a lieu de la réhabiliter en ce qui concerne la liberté de sa propre personne, et de le maintenir sous interdiction quant à la gestion de son biens. Partant la Cour a ordonné que ledit Sieur Charles Nicolle demeure présentement sous la curatelle dudit Clément Nicolle Ecr. en ce qui concerne son biens seulement." From this order the Petitioner appealed to the Full Court, which, after again summoning and itself examining the "*curateur*," "*électeurs*," and "*principaux*," on the 22nd of May, 1879, passed the following order: "*Après que ledit curateur, et ses électeurs, et les dits principaux ont été entendus par serment, la Cour, par la pluralité des opinions, et conformément aux conclusions dudit Procureur Général de la Reine, affirmant la décision du Nombre Inférieur, a jugé qu'il y a lieu de maintenir ledit Rémonstant sous interdiction en ce qui concerne l'administration de son biens.*"

The Petitioner being dissatisfied with these orders, and the Royal Court of *Jersey* having refused to give him leave to appeal against them, presented a petition to Her Majesty in Council praying that he might have special leave to appeal against the orders in question in the usual way, or else that the merits of the case might be inquired into on the hearing of the petition by way of *doléance*, and that the orders might be reversed or varied, and the Petitioner reinstated in the management of his property. When this petition first came before this Board, their Lordships conceived that a case had been made for further inquiry into the correctness of the orders impeached; but thought that the proceeding by way of *doléance* would afford the least expensive and probably the most convenient mode of trying the question. This mode of proceeding, though termed "odious" by the Code of 1771, has been approved of and recommended by Her Majesty's Commissioners on the law of *Jersey;* and their Lordships need hardly say that its adoption on the present occasion implies no disrespect towards the Royal Court.

The learned Judges of that Court have made a return in the

J.C.
1879
Ex parte NICOLLE.

ordinary form, and their Lordships have now to consider how far that justifies the orders that have been made, or whether the Petitioner is entitled to any and what relief in respect of them.

Their Lordships will assume that the Court was justified in refusing the Petitioner leave to appeal, inasmuch as according to the law and practice of the island no appeal in such cases lies as of right to Her Majesty. That of course does not prevent Her Majesty from granting by virtue of her prerogative either special leave to appeal or the relief now sought by way of *doléance*. The substance of what the learned Judges have returned to this Board is as follows: They say, "In the course of the inquiry it appeared that *Charles Nicolle* had not of late addicted himself to excessive drinking, and that his conduct at the hospital had been regular and unexceptionable. With this evidence before them the inferior number of the Royal Court unanimously, and on appeal the majority of the Jurats present, were of opinion that while there were sufficient grounds to relieve *Charles Nicolle* from *curatelle* as regarded his person, it was expedient, in the interest of his children, that it should be maintained as regards his property for some time longer. It is obvious that the opinion of the *principaux* who considered him capable of having the management of his property is founded on no facts within their knowledge, and it is to be remarked that of the three whose affidavits are annexed to the petition, one Dr. *Le Crouier*, is careful not to make any statement on that point, but confines himself to testifying that *Charles Nicolle* has ceased to be a drunkard, that his conduct has for the last three years been exemplary, and that he is a man of perfectly sound mind. Not a single circumstance was brought under the notice of the Court of a character to lead to the belief that *Charles Nicolle* could be safely trusted with the care of his family and the management of his property. Not only during the last twelve years has he administered nothing, but during ten years of that time he has not sought to help himself or his children in the slightest degree, with the exception of six months, when an attempt was made, as has been said, to find him employment with a farmer, but without success. He has remained in the hospital in voluntary idleness, and even since he has found employment in

J. C. 1879

Ex parte NICOLLE.

the hospital he does not appear to have done anything for his children, to have shewn any solicitude for their education, or to have taken any interest in their welfare. The Court therefore thought it was expedient to delay restoring to him the management of his property for a short time longer, that is, until his youngest children have completed their apprenticeship and are able to provide for themselves." Then they state the general law: "It is to be observed that by the law of this island recourse may be had to a *curatelle*, not only in cases of lunacy and mental incapacity, but whenever through drunkenness, prodigality, misconduct, or incapacity of any other kind it may become necessary or expedient to subject a person to control in the management of his property."

Their Lordships conceive that this statement as to the law is somewhat too wide. They have been referred to the Report of the Royal Commission on the law of *Jersey*, and to the evidence taken under it, and the conclusion to which they have come is that according to the law under which these proceedings have been had, it is necessary, in order to place a man under "*curatelle*" in the first instance, to satisfy the Court not only that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. Mere prodigality without proof of habitual drunkenness will not suffice to support the original grant of an interdiction; and in order to establish the intemperance the Court must have not merely the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure seems to be adopted on an application like the present, for the removal of the interdiction, and the re-instatement of the party in his civil rights. Six *principaux* are again summoned and examined. In the present case *les principaux* are agreed that the Petitioner has been cured of his intemperance; and the Court are so far satisfied of that that they rehabilitated him in all that concerns the liberty of his person. Their Lordships fail to see that when there has been such a reformation of the intemperate habits as justifies the reversal of the interdiction in respect of the person, there exists any legal power in the Court to continue the *curatelle* as to the property upon a mere suggestion that it will be better and more

expedient for the family so to do. The Royal Court of *Jersey* has no doubt made the orders under consideration from an honest conviction that it would be better for the children that the property should continue to be administered by the curator rather than by the Applicant himself; but their Lordships cannot find any law which authorized the Court to deprive the Petitioner, if cured of his intemperance, of the management of his property upon any consideration of that kind. If the law had clearly given them such a discretion, their Lordships would have been slow to interfere with its exercise; but they are bound to see that in the administration of this exceptional, though possibly wholesome law, the Judges do not exceed the limits of their authority.

Under these circumstances their Lordships think that a sufficient case has been made out upon this petition and *doléance* to justify them in humbly recommending Her Majesty to reverse the orders of the 21st of December, 1878, and the 22nd of May, 1879, to declare that the Petitioner having been found to be now fit to have the free use of his own person, and to be released from the *curatelle* as to his person, ought also to be re-instated in the management of his property, and to direct the Royal Court to pass an order in the usual form for the annulment of the *curatelle*, the rehabilitation of the Petitioner and his re-instatement in the enjoyment of all his civil rights.

Solicitors for the Petitioner: *Jones, Blaxland, & Son.*

[PRIVY COUNCIL.]

J. C.* PHILO LAMBKIN . . . . . PLAINTIFF;

1880

AND

Jan. 29, 30, 31; *Feb.* 3. THE SOUTH EASTERN RAILWAY COMPANY . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

New Trial—Damages—Misdirection—Negligence—Civil Procedure Code, s. 426, *sub-s.* 11.

Where a Plaintiff had obtained against a railway company a verdict with damages, sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the Court of Queen's Bench on the ground alone of excessive damages, the finding as to negligence by the Defendant company being approved by two Courts:—

Held, that inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to shew that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial.

APPEAL from a judgment of the Court of Queen's Bench (March 16, 1877), reversing a judgment of the Superior Court (Nov. 30, 1875) sitting as a Court of review, which was in favour of the Plaintiff, and setting aside the verdict of the jury in his favour, and ordering a new trial on the sole ground that the damages were excessive.

The declaration stated that the Respondents were public carriers and owners of a certain railway, and that on the 13th of August, 1874, while the Appellant was lawfully travelling on the Respondents' railway in Respondents' carriages, the said carriages, with the Appellant therein, were precipitated into an open culvert, and the Appellant was so severely injured that for a month his life was despaired of, and he had never since been, and probably never

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

would be, able to attend to any business; that he had before been doing a large and profitable business as an architect, builder, and manufacturer of doors, sashes, mouldings, and household furniture; and the Appellant claimed $50,000.

In their pleas the Respondents admitted that they were public carriers and owners of the railway in question, and that on the 13th of August, while the Appellant was being carried as a passenger in their cars on their railway, an accident occurred which seriously damaged the cars and might have damaged the Appellant to an unknown extent; but they set up the defence that the accident was caused by a violent storm and flood, which made the gap into which the train fell, and prevented any warning being sent, either by telegraph or otherwise, so as to stop the train, and that there was no negligence on the part of them or their servants. The Respondents also pleaded a *défense au fonds en fait*, taking issue generally.

The Appellant filed his answer and replication, joining issue on the Respondent's pleas.

The facts are stated in the judgment of their Lordships.

Mr. *Doutre*, Q.C. (of the Canadian Bar), and Mr. *Fullarton*, for the Appellants, contended that the verdict, with which the Judge who tried the cause was altogether satisfied, should not be disturbed and a new trial ordered on a mere question of amount, unless under special and extraordinary circumstances, which did not exist and were not suggested in this case. They referred to the Canadian Civil Procedure Code, s. 426, sub-s. 11. The English rule is the same as the Canadian: see *Mayne* on Damages, p. 513; *Creed* v. *Fisher* (1); *Edgell* v. *Francis* (2); *Phillips* v. *South Western Railway Company* (3).

Mr. *Bompas*, Q.C., and Mr. *Jeune*, for the Respondents, contended that the order for a new trial was right. There was misdirection in not sufficiently or correctly stating the circumstances under which the Respondent company would be responsible for the negligence of its servants, or what constituted such negligence.

(1) 9 Ex. 472. 18 Jur. 228
(2) 1 M. & G. 222.
(3) 4 Q. B. D. 406; 48 L. J. (Q. B.) 693.

J. C. 1880 LAMBKIN v. SOUTH EASTERN RAILWAY CO.

There was no evidence of such negligence, and the damages were excessive.

Reference was made to *Nugent* v. *Smith* (1); *Railroad Company* v. *Reeves* (2).

The Appellants were not called upon to reply.

1880 *Feb.* 3.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an action brought against the *South Eastern Railway Company* of the province of *Quebec* to recover damages which the Plaintiff sustained by reason of an accident to a train in which he was a passenger. The Plaintiff obtained a verdict, with damages $7000. The railway company applied to the Superior Court of *Montreal* for a new trial upon a number of grounds, including misdirection, the verdict being against the evidence, and the damages being excessive. That Court unanimously expressed themselves satisfied with the verdict, and refused a new trial. Upon this the Defendants appealed to the Court of Queen's Bench. The Court of Queen's Bench, as their Lordships understand, expressed their approval of the verdict, or, at all events, expressed no disapproval of it upon any ground except that of excessive damages; and upon that ground alone directed a new trial. From that judgment of the Court of Queen's Bench the present appeal is preferred.

It has been sought to uphold the judgment upon grounds other that on which it was pronounced—viz., that the verdict, as far as it finds negligence on the part of the company, is against evidence, and that the Judge misdirected the jury. With respect to the verdict being against evidence, it appears to their Lordships, as indeed they have before intimated, that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by two Courts, is not open under the ordinary practice to the Defendants. However, the Defendants have argued, as they had a right to argue, the question of misdirection; and the direction of the learned

(1) 1 C. P. D. 19, in Appeal 423. (2) 10 Wallace's Rep. 176.

Judge cannot be considered altogether apart from the evidence to which it applies.

Without going at length through the evidence, it is enough to say that the Plaintiff was a passenger on the 13th of August, 1874, on the Defendants' railway, and that the accident occurred at a point between the station of *Abercorn* and the station of *Sutton*, the distance from one to the other being about five-and-a-half miles; that the line between the two stations is intersected by a number of streams which are all spanned by bridges, and at times, perhaps generally, contain but little water, but are apt to be flooded after storms. It appears that on the evening before the accident, the 12th of August, a violent and most unusual storm had occurred, perhaps in the nature of a waterspout, which carried away five out of six bridges between the two stations. The next morning, at about half-past six, the train in which the Plaintiff was travelling dashed into the bed of one of these streams, of which the bridge had been demolished, without any warning whatever having been given to the driver of the train. The result was that some persons were killed and many injured—the Plaintiff among them. It was the duty of four men, headed by one who is sometimes called "the boss," to look after the railway between these two stations, a part which would appear to require more than usual care and attention. It was the duty of these men, upon the occurrence of the storm, and some of the bridges being washed away to their knowledge on the previous evening, to use all exertions in their power to stop the train which was coming in the morning. Of two of these men we hear nothing. A third, *Doran*, who lived at a house rather more than a mile from *Sutton*, was called; and he speaks of a bridge close to his house being carried away, and of his apprehension that other bridges would be carried away, and says that upon starting on the line in the direction of the *Abercorn* station in the morning at about four o'clock he was unable to proceed. He then went to the *Sutton* station, and requested the station-master to telegraph to *Abercorn*, but it was ascertained that the telegraphic communication was interrupted. *Doran*, who had borrowed a horse, returned to his own house and planted a flag at the place where the bridge opposite to his house had been demolished; but instead of riding on to ascertain the

J. C. 1880 LAMBKIN v. SOUTH EASTERN RAILWAY CO.

state of the bridges between his house and *Abercorn*, he put the horse up and contented himself with remaining where he was. It appears to their Lordships that the jury might have come to the conclusion fairly upon the evidence that if he had ridden on he might have arrived at the place where the accident occurred in time to stop the coming train. *White*, the foreman or "boss," was not called. He appears to have done but little. He was aware, according to some evidence, that one of the bridges had been washed away as early as four o'clock in the morning. He appears to have made no effort to go beyond the bridge at *Doran's* house. The time he arrived there is not very clearly fixed. If it was, as *Doron* says, at a quarter before six, he would have had time to stop the coming train, which, although due before, did not arrive till half-past seven. Whether he was there at that time or not, it appears to their Lordships that upon the evidence the jury were warranted in the conclusion that he was guilty of negligence.

The summing-up of the learned Judge must be taken with reference to the circumstances of the case and to the evidence. The following passage has been picked out and objected to: "First of all was there time to give notice? That, of course, is easily answered; there was time. Then, was there a possibility of doing it? That is the question." Their Lordships have read through the summing-up of the learned Judge; and although he may not have explained the law quite as clearly or fully as might have been desired, they are unable to see that he has misdirected the jury. He appears to have put to them as a question of fact whether there was time for either of the men to have got to the place of the accident so as to stop the train; and further, whether, if there was time—that is, if there had been time under ordinary circumstances,—there were physical obstacles, such as the unusual depth of the intervening streams, which would have prevented it; for, undoubtedly, during a portion of the night all the streams were so deep as to be scarcely passable, whereas in the morning the mountain flood had subsided almost as rapidly as it had arisen. The duty of the servants of the company must be taken with reference to the emergency; and the jury might be properly told that those persons who had charge of the line ought, and were bound, to do all they could to stop the train which was rushing on

destruction. It appears from the summing-up, taken as a whole, that the learned Judge, when using the word "possibility," meant to put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case. Their Lordships, therefore, are of opinion that there was no misdirection.

We now come to the question whether the damages were excessive. It appears that the Plaintiff was found soon after the accident with his head jammed between two pieces of timber, that it took two or three hours to release him, which was done by cutting away the timber; that he was then conveyed to *Richford*, a place at no great distance, and was attended to by two or three surgeons, among others, by a surgeon of the company. The surgeon who first saw him, or at all events who saw him very soon after the accident, is a Mr. *Fassett*, who thus describes his injuries:—"The wounds upon the face were—a cut upon the right side of the lower jaw; and above that, near the ear, there seemed to be a bruise. Upon the forehead, near the right, was a cut; it seemed to be simply a cut. Over the left eye there was a severe bruise, which seemed to have been caused by pressure rather than a blow. That was the idea it gave me on examining it. The wound on his thigh was a lacerated and punctured wound. He lay upon the bed, apparently not noticing things around him, restless, tumbling about, not heeding anything apparently that was going on." He goes on to say that the man was from time to time delirious, and adds: "I think I gave an opinion at the time at *Richford* that his condition was dangerous then, and if he recovered at all he would probably not fully recover, and I am still inclined to favour that opinion." He attributes the injury of the brain to pressure, his theory being that the two sides of the skull were to a certain extent pressed together. The Plaintiff was attended by Mr. *Hamilton*, a surgeon employed by the company to take care of the wounded, and he gives a description of the state of the Plaintiff not materially different from that of the last witness. He says the Plaintiff was delirious for two or three weeks when he attended him; that he was subsequently removed, and that he had seen but little of him between the time of the accident and the time of the trial, which was just twelve months. He expresses no very confident opinion about his state. He thinks he may

J. C. 1880 LAMBKIN v. SOUTH EASTERN RAILWAY CO.

recover, but will not undertake to say that he will or to fix any probable time for recovery. We have further the evidence of Dr. *Gibson*, the medical attendant of the Plaintiff, who speaks of him as being in a very dangerous state at *Richford*, so dangerous that at one time his life was despaired of. He does not speak to having attended him very much subsequently, for his physical health appeared to have improved, and he says very candidly that he thought medicine would do him little good; but he speaks to having had a conversation with him shortly before the trial, from which it would appear that his brain was still affected; not that he was idiotic or insane, but that his conversation was rambling, and that he was unable to fix his ideas upon any subject or to attend to business. This witness also declines to give an opinion as to whether the man would ever thoroughly recover, although possibly he might recover.

There is a considerable body of other evidence. The Plaintiff calls his brother, his cousin, and some neighbours, the effect of whose evidence may be shortly stated to be that the Plaintiff was in partnership with his brother, the Plaintiff being the elder and the more active partner; that they carried on business as builders, and that the Plaintiff did the work of an architect,—was capable of designing a house or public building and seeing to the execution of his design; that they carried on business as manufacturers of cabinet and other articles; that the Plaintiff also, being an active and industrious man, from time to time charged $3 or $4 a day for his own work, in addition to the profit on the work of the labourers he employed and on his materials; and that the two brothers were making some $5000 or $6000 a year. The evidence, though not perhaps as conclusive as might be desired on this subject, is to the effect that the business had to a certain extent suffered. The brother said that he had to refuse some orders which otherwise he would have accepted; there is evidence on his part, and also that of the neighbours, of the business having fallen off; it is obviously probable that the business would fall off, more perhaps in future years than at once. There is further evidence that the Plaintiff, although before the accident a strong vigorous man, with much capacity for business, became incapacitated for business; that he was weak and languid in physical

health, and unable to fix his attention continuously upon one subject, from the time of the accident up to the time of the trial. One witness, a director of the company, who can scarcely be supposed to be biassed against them, says: "I have tried to talk business with him lately. I did not find him the same man that he used to be. If he goes to talk about business, he wanders directly and gets astray. I cannot say but what this must affect his fortune. He has not been engaged in building since the accident. I do not think he was able to do so."

On the part of the company Dr. *Scott* was called, who said that he did not think that the symptoms complained of by the Plaintiff could arise from compression of the skull, inasmuch as he thought that, at the age of the Plaintiff, the skull would not be compressible without fracture. The further effect of his evidence appears to be that he thought, from the description which he had heard of the injuries, that the Plaintiff ought to have recovered, and therefore that he must be feigning illness. He says that, without having seen the Plaintiff, he is as confident in his opinions as if he had seen him, a confidence which appears to their Lordships to contrast unfavourably with the caution with which the evidence of the other medical men is given.

Assuming the jury to have believed the evidence on the part of the Plaintiffs, their Lordships think that they would have been wrong if they had confined the damages, which they had to assess once and for all, solely to what the Plaintiff had lost at the time of action brought or at the time of the trial; that it was their duty to take into consideration that the Plaintiff had been disabled for twelve months; that he had not then recovered, and that it was doubtful, according to the best evidence, whether he would recover at all, or, if he did recover, when he would recover; and although an estimate of future damages must necessarily be of a somewhat rough and speculative character, still that they were bound to give him some damages in respect of the future loss which he would sustain.

The learned Judges appear to have directed a new trial upon the supposition that the jury only gave damages in respect of what the Plaintiff had lost at the time either of action brought or of the trial, and that those damages are excessive. Such is the

J. C. 1880 LAMBKIN v. SOUTH EASTERN RAILWAY CO.

view certainly of Mr. Justice *Sanborn*, who says: "It is impossible that three or four weeks' illness, and more or less loss of time for some months of a man who earned four dollars a day, could occasion a loss of $7000." Their Lordships may observe that Mr. Justice *Sanborn* seems not to have been quite correct in estimating the loss of the Plaintiff as of a mere labourer who earned $4 a day, inasmuch as the evidence is that the Plaintiff not only earned $4 a day in addition to the profit upon his workmen and materials, but carried on business as a manufacturer. It appears to have been inferred that the jury intended to assess damages only up to the time of the trial, from their answer to one of the questions put to them in the articulation of facts. But their Lordships are by no means satisfied that such was the intention of the jury. They are first asked: "Has the Plaintiff ever since the sad accident been disabled from doing business, and to what extent is he disabled from attending to business? *A.* He has been disabled up to the present time:"—that is to say, they did not think him cured. Then this question is put, which divides itself into three: "Is the Plaintiff the head of a family composed of his wife and three children? Are they all dependent upon his labour for their maintenance? Have they ever since been deprived of his labour, and to *what extent in the future will they be deprived of his labour?—A.* He is the head of a family consisting of a wife and three children; one, a son, is not dependdent; wife and two girls dependent." The answer to the second part of the question is: "They have been deprived;" and to the third, the jury answer that they cannot form a judgment.

Their Lordships scarcely understand on what principle this question should have been put to the jury. The question in the cause was not what damage had been sustained by the Plaintiff's wife and children, but what damage had been sustained by himself. If he had been killed, and such an action as that brought under *Lord Campbell's Act* in this country could be maintained in *Canada*, then the question would be what damage was sustained by his wife and children. But the jury are further asked, "To what extent in the future will the wife and children be deprived of his labour?" which seems to mean, "For what time will the wife and children be deprived of his labour?" It

had been originally proposed to put the question in the form: "For what time, under probable circumstances, or in all probability, would they be deprived?" But on the Defendant's objection the question stands in its present form, and the jury are required to fix the time when the Plaintiff will recover. They declined to do what no witness, medical or otherwise, had attempted, but their Lordships do not therefore infer that when they answer the further question, "Has the Plaintiff suffered damages by the said accident, and, if so, to what amount?" they excluded all consideration of future loss. If they had thought that the Plaintiff would be disabled for all the rest of his life, in their Lordships' view the damages would be too small; but if they adopted the intermediate view, which seems to be, on the whole, the result of the evidence of the Plaintiff's witnesses, medical and otherwise, that the Plaintiff had been seriously injured, that he still continued to suffer, that his brain still continued somewhat affected, that he was unable to attend to business, and that it was uncertain whether he would ever recover, although he might recover, their Lordships feel unable to say that the damages given were so excessive as to justify a new trial upon that ground. They observe that the law of *Canada*, as expressed by Article 426, sect. 11, is not far different from that of this country upon this subject: "If the amount awarded be so small or so excessive that it is evident the jury must have been influenced by improper motives or led into error, then a new trial must be granted." On the whole, their Lordships are by no means satisfied that the damages are of such an excessive character as to shew that the jury have been either influenced by improper motives or led into error, and they are of opinion that there ought to be no new trial.

Therefore, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench be reversed: that the judgment of the Superior Court of *Montreal* be affirmed; and that the Appellant have the costs of the appeal in *Canada* and of the appeal to Her Majesty in Council.

Solicitors for Appellant: *Simpson, Hammond, Richards, & Simpson.*

Solicitors for Respondent: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.* 1880 Feb. 6, 7, 10.

JEAN BAPTISTE THEOPHILE DORION . DEFENDANT;

AND

LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL . . } PLAINTIFFS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, QUEBEC (APPEAL SIDE).

Civil Code, Arts. 499, 553, 554—*Real Servitude—Obligation to allow and repair a Road—Prescription.*

By a seignorial deed executed in 1804, certain land was granted to *S.* subject to the obligation that part of it was to be used for a road which the grantee was to make and keep in repair, the grantors being primarily liable to the municipal authorities in respect of such repair.

The same land passed in 1862 to the Appellant by a sheriff's sale made under a decree against the then proprietors.

In an action *en garantie* brought by the grantors of the land against the Appellant to compel him to indemnify them in respect of their statutory liability to repair the said road:—

Held, that such obligation created a real servitude within the meaning of Art. 499 of the *Civil Code*, and consequently that the sheriff's sale, whether or not it included the road, did not discharge the land from such servitude.

Held, further, that the obligation to repair not being separable from the obligation to allow the land to be used as a road, the servitude created thereby could not be prescribed against under Art. 2251 of the Code by non-repair for ten years. The land having been constantly used as a road, the Appellant had not had effective possession thereof for ten years against such servitude.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (March 20, 1877), whereby a judgment of the Superior Court (June 30, 1877) was confirmed.

The question raised by the appeal was as to the right of the Respondents to be indemnified by the Appellant, under the circumstances stated in the judgment of their Lordships, in respect of a claim made against them by the corporation of the parish *du Sault au Récollet*, in *Montreal*, for the cost of certain repairs

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

effected by the parish to a road which divides the property of the Respondents from that of the Appellant.

The said claim was the subject of an action by the parish on the 4th of February, 1874, in the Circuit Court of *Montreal*, against the Respondents, the declaration therein stating that the Respondents were proprietors and occupiers of a certain property or farm within the limits of the parish bounded on the south-east by the road along the front of the *Côte St. Michel*, which was a public road under the jurisdiction of the parish; that the road was common to two properties; that by law and the Code Municipal in force the Respondents were bound to maintain one half of the said road fronting their property, and had neglected and refused so to do, whereby the parish was compelled to repair and maintain the same at a cost of ten piastres.

On the 27th of February, 1875, the parish recovered judgment against the Respondents for that amount.

On the 20th of March, 1874, by an action *en guarantie*, the Respondents claimed that the Appellant should be compelled to intervene in the former action, and to guarantee and indemnify the Respondents the amount of the damage they should sustain therein, and the costs of both actions.

The declaration in the action *en garantie* contained statements to the effect following:—

"On the 16th of November, 1804, the Respondents who are seigniors of the seigniory of the Island of *Montreal* duly conceded, *à titre de cens et rentes*, to one *Oliver Smith* a farm, situated on the lesser *Côte St. Michel*, in the said Island of *Montreal*, upon condition, among others, that he should furnish the entire area of the road along the front of the said farm, and afterwards should make and maintain the said road, and also should make the ditches and hedges on both sides of the said road so long as the Respondents should hold possession of the opposite domain."

On the 27th of March, 1874, the Appellant put in his defence containing three pleas, of which pleas No. 1 and No. 2 were in effect as follows:—

Plea No. 1. On the 7th of February, 1862, the Appellant acquired the hereditament (*l'immeuble*) mentioned in the said

J. C. 1880

DORION v. LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL.

action *en garantie* at a public sale, which had been made by the sheriff of *Montreal*, free from every charge, obligation, or servitude.

The said public sale freed the said hereditament from every charge, obligation, or servitude that the Respondents had or could have against the said hereditaments of the nature of that mentioned in the action *en garantie* or by special contract.

Plea No. 2. Even assuming the allegations in the declaration in the action *en garantie* of the Respondents to be true, the Appellant is freed by prescription from every such right, charge or servitude, having been in possession of the said hereditament described in the declaration for above ten years as proprietor peaceably and *bonâ fide* in pursuance of the sale to him by the sheriff of *Montreal*.

The judgments of the Superior Court and the Court of Queen's Bench were in favour of the Respondents.

Mr. *Barnard*, Q.C. (of the Canadian Bar), and Mr. *Kenelm Digby*, for the Appellant, contended that the obligation of repairing the road created by the deed of the 16th of November, 1804, was merely a personal obligation. It only bound the parties to the deed and their representatives. At all events, if the deed of the 16th of November, 1804, created an obligation which was in any way a charge on the land, the effect of the sheriff's sale was to purge such charge. By Art. 711 of the Canadian *Code of Civil Procedure* a sheriff's sale discharges property from all real rights not mentioned in the conditions of sale excepting certain rights thereinbefore mentioned, amongst which are "servitudes." Means are provided by the Code for the protection of any claim which would otherwise be barred by the sheriff's sale by "oppositions" to the sale: see *Code of Procedure*, Arts. 648–659. The question, therefore, is whether the deed of 1804 created a "servitude" binding the land in the hands of the Appellant. It is submitted that the duty in question is not a servitude. There is in this case no servient and no dominant tenement. The soil of the road is not vested in the Appellant, the property sold by the sheriff being described as "bounded by" the road in question. The road, as soon as it was made, became detached from the property sold in

1804 to *Oliver Smith*, and vested in the municipality: see *Consolidated Statutes of Lower Canada*, c. 24, s. 40, § 18. Besides, the road was not for the benefit of the Respondent's land, but was a public road. The fallacy of the argument below consists in the Court having proceeded as if this were the case of a private road on the Appellant's land instead of being a public road outside the Appellant's land. Nor can the obligation to repair the road be a servitude. Both by Canadian and English law a servitude is a burden imposed on the servient tenement and is purely negative —to suffer not to do. (See *Gale* on Easements, p. 7; *Dig. de Servitutibus*, lib. viii., tit. 1, l. 15, § 1.) As regards Art. 499 of the *Civil Code*, relied upon by the Courts below, it was submitted that the definition contained therein was merely declaratory of the existing principles of law and did not extend the class of rights called servitudes further than before. With regard to the other contention in those judgments, that Art. 554 of the *Civil Code* contemplated the possibility of a servitude consisting of an active obligation to repair, that can only be where the active duty is incident to a servitude, and in this case the user of the public road was not a servitude burdening the Appellant's land. Reference was made to *Lefebvre* v. *Gosselin* (1); *Rangeley* v. *Midland Railway Company* (2); the First Report of the Codifying Commissioners, p. 383, on Art. 499; *Murray* v. *Macpherson* (3); *Demolombe*, vol. xi., No. 8, vol. xii., p. 405, Nos. 871, 877, 878; p. 411, No. 880. *Pigeau, Hypothèque*, vol. i. p. 779; *Pothier* on Civil Procedure, No. 638, 640, c. ii., sect. 5, sub-sect. 8.

Secondly, if any such servitude as the Respondents allege ever existed, any right which the Respondents may have had in respect thereof is barred, the Appellant having had peaceable and *bonâ fide* possession of the land in question for more than ten years before action brought. The requisite prescription is that of ten years in favour of *bonâ fide* purchasers under article of the *Civil Code* No. 2251, and not that of thirty years under Art. 562. These Articles are based respectively on two articles of the *Coutume de Paris*, 114 and 186; *Pothier, Traité de la Prescription*, vol. ix., c. 5, Nos. 126, 127, 139. Compare *Code Napoléon*, Arts.

(1) 9 Low. Can. Jur. 95.
(2) Law Rep. 3 Ch. Ap. 306, judgment of Lord *Cairns*, p. 310.
(3) 5 Low. Can. Rep. 359.

J. C. 1880

DORION v. LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL.

706, 2264, 2265. As to the date from which prescription runs see *Civil Code of Lower Canada*, Arts. 2232, 2236, the observations in the report of the Commissioners on Art. 68 which is the same as Art. 2236, 1st Rep. p. 427.

Mr. *Benjamin*, Q.C., and Mr. *Rodwell*, for the Respondents, were not called upon.

The judgments of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in two actions which were brought in the Superior Court of the province of *Quebec*. The original action was brought by *La Corporation de la Paroisse du Sault au Récollet* against *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal*, to recover the expenses of the repair of part of a road which the seminary was liable by the general law to repair. The seminary, who are the Respondents in the present appeal, then brought an action *en garantie* against the Appellant, Mr. *Dorion*, to compel him to indemnify them from the consequences of the action by the parish, on the ground that he held an estate subject to an obligation to repair the portion of the road in respect of which the seminary were sued by the parish.

The circumstances which gave occasion to the action *en garantie* are shortly these: On the 16th of November, 1804, a seignorial deed was executed between the seminary of the one part and one *Oliver Smith* of the other, by which the seminary granted land, part of a larger estate, to *Smith* upon certain conditions. The condition which creates the obligation in question is the following:—"*Plus ledit preneur, ses dits hoirs et ayant-causes seront chargés de fournir toute la largeur du chemin sur le front de ladite terre, et ensuite de le faire et l'entretenir, et même de faire les fossés et clôtures des deux côtés dudit chemin tant que lesdits sieurs seigneurs posséderont la partie dudit domaine opposée.*" The land so granted to *Smith*, though it does not appear by what means, became the property of one *Dugas* and his wife, and was sold by the sheriff on the 7th of September, 1862, under a decree against *Dugas* and his wife, to *Dorion*, the Appellant.

It is contended, on the part of the Appellant, that whatever obligation was created by the grant to *Smith* to repair the piece of road in question was purged by the sheriff's sale; and he relied on certain Articles of the *Code of Procedure* for *Lower Canada*, which are to the effect that a sale by the sheriff discharges the estate from all real claims except those specifically mentioned. One of those specifically mentioned is servitudes. Article 709 is this: "A sheriff's sale does not discharge immovables from servitudes with which they are charged."

The question in this case is, whether the obligation contained in the original deed of grant of this estate to *Smith* created a servitude. In considering this question the provisions of the *Civil Code of Canada* which define and enumerate servitudes are to be regarded. Article 499 of that Code defines generally a servitude: "A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor." The obligation to repair a road imposed on one estate for the benefit of the owners of another would, *primâ facie*, seem to be a charge within the terms of this article. No doubt, by the old French law founded on the Roman law, and by the law of *Canada* before the Code, a servitude was understood to be, that the owner of the servient tenement was only to suffer, and not to do any act. It is unnecessary to cite the authorities on that subject, because the old law is clear, and may be taken to be correctly stated by *Toullier* (3rd volume) in Nos. 377 and 378, which are cited by Mr. Justice *Belanger* in his judgment. *Toullier's* observations are an exposition of the maxim: "*Servitutum non ea natura est ut aliquid faciat quis—sed ut aliquid patiatur aut non faciat.*" It is admitted by writers on the French Code, which contains a definition and enumeration of servitudes similar to those found in the *Canada* Code, that the principle of the old law has been invaded, and that under the Code some active servitudes may be imposed upon land. But they qualify the admission by affirming that only such active servitudes as are ancillary to servitudes in their strict meaning are contemplated by the Code.

In reference to the particular obligation in question, the following articles of the *Canada* Code are material to be considered: Article 553, "He to whom a servitude is due has the right of

J. C. 1880

DORION v. LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL.

making all the works necessary for its exercise and its preservation;" Article 554, "These works are made at his cost, and not at that of the proprietor of the servient land, unless the title constituting the servitude establishes the contrary." Therefore, the Code contemplates that, in the creation of a servitude, the parties may by contract impose the active maintenance of it upon the servient tenement. *Demolombe's* Commentary on the *Code Napoléon* was cited to establish that a limitation had been placed on the generality of the Article of that Code which corresponds with Article 499 of the *Canada* Code. No doubt, *Demolombe* has put a limited interpretation upon that article, and holds that it must be confined to those active servitudes which are ancillary to passive servitudes. He says in his 12th volume, No. 871, "*Régulièrement le propriétaire du fonds servant n'est tenu que d'une obligation toute passive.*" But he goes on to say at No. 873: "*L'article* 698, *au contraire, après avoir déclaré que les ouvrages nécessaires à l'exercice de la servitude sont aux frais du propriétaire du fonds dominant, et non à ceux du propriétaire du fonds assujetti, cet article ajoute cette disposition: 'A moins que le titre d'établissement de la servitude ne dise le contraire,' et décide, comme règle générale, qu'il est permis par l'acte constitutif de la servitude de mettre ces ouvrages et ses frais à sa charge.*"

In the present case, their Lordships think that the effect of the deed is, that the estate was conveyed to *Smith* subject to the obligation that part of it was to be used for a road which the grantee was to make and keep in repair. The land to be so used was not excepted out of the grant to *Smith*, but on the contrary was granted to him as part of an entire estate, subject to the obligation that it should be used for the purpose of a road. The obligation to repair was not an independent servitude separately created, but was part of the entire servitude imposed upon the land on the grant of it. In its inception there can be no doubt that this was so, and that the obligation was for the benefit of the estate which the seminary retained, and which may be called the dominant tenement. By imposing the obligation upon their grantee to furnish the land for the road out of the estate granted to him, the seminary escaped the liability of furnishing any of the land they retained for that purpose, and they provided that the

liability should fall upon the grantee of making and repairing the road for its whole breadth. An obligation would otherwise have rested upon that part of the estate they retained to make and repair so much of the road as was opposite to their land, *ad medium filum*.

A real servitude having been defined in Article 499, Article 500 is in these terms: "It arises either from the natural position of the property or from the law, or it is established by the act of man;" the last expression, of course, meaning by the contract of the parties. Then the Code, having dealt with those which arise from the situation of property, proceeds in Article 506 to define servitudes established by law: "Servitudes established by law have for their object public utility or that of individuals." Article 507, "Those established for public utility have for their object the foot-road or tow-path along the banks of navigable or floatable rivers, the construction or repair of roads, or other public works." So that one of the servitudes which may be imposed by law is the construction and the repair of roads. Can a servitude of a like nature be created by contract. Their Lordships think it is unnecessary to determine the question in this naked form, because they are of opinion, for the reasons above given, that the obligation to make and repair the road formed part of an entire servitude, to allow the use of land for the purpose of a front road (a use in which the owner on the opposite side was interested), and to make and repair that road. That was the obligation and servitude which *Smith* undertook in accepting the grant from the Respondents, and to which the land became subject.

Then it is said that the present Appellant, *Dorion*, bought at the sheriff's sale only the land up to the road. Undoubtedly it is so described, but the obligation to repair affected the whole of the estate originally granted to *Smith*, and could not be got rid of by *Smith*, or anybody deriving title from or through him, severing the estate, if, indeed, which is not clear, the sale had that operation.

Their Lordships think, therefore, that the majority of the Judges below were right in the conclusion to which they came, that this obligation was a servitude within the meaning of the Civil Code, that it was not purged by the sheriff's sale, and was

J. C. 1880 DORION v. LES ECCLÉSIASTIQUES DU SÉMINAIRE DE ST. SULPICE DE MONTRÉAL.

kept alive by force of Article 709 of the Code of Civil Procedure. The Judges rest their judgment in some degree upon a case of *Murray* v. *MacPherson*, which had been decided before the preparation of the Civil Code, and they say that some provisions of the Code were founded upon the principle acted upon in that decision. However that may be, their Lordships think, though the case is not without its difficulties, that they ought not to disturb the decision of the Court below upon this point.

The next question is, whether the right to insist on this servitude has been taken away by prescription. The question arose below, and has been argued at the bar, whether the case falls within Article 2251, which gives a prescription of ten years, or Article 562, which gives a prescription of thirty years. It was admitted that the latter had not run against the right in point of time. Then, supposing that the Appellant is right in considering that Article 2251 is applicable to the case, their Lordships think that the right is not prescribed by it. That article is as follows: "He who acquires a corporeal immoveable in good faith under a translatory title prescribes the ownership thereof, and liberates himself from the servitudes, charges, and hypothecs upon it by an effective possession in virtue of such title during ten years." If this servitude were to be regarded as a mere obligation to defray certain charges as an independent servitude, it may be that it would have been prescribed under this article, inasmuch as no repairs had been done, and no claim made in respect of them, for a period of ten years. But the servitude, as their Lordships understand it, and as they have already intimated, was not of this nature; and it appears to them that the obligation to repair cannot, for this purpose, be regarded separately from the obligation to allow the land to be used as a road. Then, if that be so, the land has been constantly used as a road, and, therefore, the Appellant has not had an effective possession for ten years in virtue of his title against the servitude so understood. The Judges below have unanimously decided against the Appellant on this point.

For these reasons, their Lordships will humbly advise Her Majesty to affirm the judgments of the Court below, and with costs.

Solicitors for Appellant: *J. & C. Robinson & Williams.*
Solicitors for Respondents: *Freeman & Bothamley.*

[PRIVY COUNCIL.]

GOLDRING . . . . . DEFENDANT;

AND

LA BANQUE D'HOCHELAGA . . . . . PLAINTIFFS.

J. C.*
1880
Feb. 7.

In re PETITION OF LA BANQUE D'HOCHELAGA.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Canadian Code of Civil Procedure, Arts. 1178, 798, *and* 801—*Interlocutory Judgment—Right of Appeal.*

It is not competent to the Court of Queen's Bench for *Lower Canada* to grant leave to appeal to Her Majesty in Council from an interlocutory order, unless specially authorized so to do by the *Code of Civil Procedure.*

A judgment of the Court of Queen's Bench affirming a judgment of the superior Court, which rejected the Appellant's petition that a certain writ of *capias ad respondendum* issued against him under Arts. 798 and 801 of the *Code of Civil Procedure* might be set aside, is not a final judgment within the meaning of Art. 1178.

THIS was a petition by the Respondent bank to rescind an order of the Court of Queen's Bench (June 24, 1879), granting a motion of the Appellant for leave to appeal to Her Majesty in Council, and to dismiss a petition of appeal presented in accordance therewith, and praying that certain judgments of the Courts below be reversed or varied.

The petition stated that, on the 12th of March, 1879, the bank obtained a Judge's order in an action by them against the Appellant, for the issue of a writ of *capias ad respondendum* against the Appellant, under Articles 798 and 801 of the *Code of Civil Procedure* of *Lower Canada*, bail being fixed thereby at $77,500; that on the next day the sheriff of *Montreal* duly returned that he had arrested the Appellant, and on his neglecting to give bail lodged him in gaol; that on the 14th of March the Appellant filed a petition praying, *inter alia*, that the affidavit on which the writ was issued might be declared to be insufficient, and that the

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1880 GOLDRING v. LA BANQUE D'HOCHELAGA.

writ was issued illegally and improvidently, and that the Appellant might be discharged, and his arrest declared to be illegal and set aside; and another petition praying that bail might be reduced; that on the 17th of March, 1879, the bank filed their declaration in the action; that on the 6th of April, 1879, the Court rejected the Appellant's first petition with costs, but reduced the bail; that the Court of Queen's Bench, on the 24th of June, 1879, affirmed the said judgment, but granted leave to the Appellant to appeal to Her Majesty in Council.

Mr. *Kenelm Digby*, for the Respondent bank, contended that by the law of the province of *Quebec* no appeal lay from the judgment of the 24th of June, 1879, such judgment not being a final judgment within Article 1178 of the *Civil Procedure Code*. It was not an appealable judgment under the provisions of that article or otherwise. He referred to sects. 796, 820, 1115, 1116, and 824 of the Code, and Consol. Stat. c. 77, s. 52.

Mr. *Doutre*, Q.C. (of the Canadian Bar), for the Appellant, relied upon sect. 822, and referred to *Canadian Bank of Commerce* v. *Brown* (1); *Blanckensee* v. *Sharpley* (2); *Gugy* v. *Ferguson* (3); *Sauvageau* v. *Gauthier* (4).

Mr. *Digby* replied, referring to sects. 1178 and 1115.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

Their Lordships, upon the best consideration they can give to this case, are of opinion that it is not one in which it was competent to the Court of Queen's Bench to grant the leave to appeal. The 1178th Article of the *Code of Procedure* is precise that an appeal lies to Her Majesty in her Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench. Then it gives the cases in which the appeal is allowed. There is no express provision for the allowance of such an appeal from an interlocutory order. The argument in support of the order of the

(1) 19 Low. Can. Jur. 110.
(2) 3 Low. Can. Jur. 292.
(3) 12 Low. Can. Rep. 254.
(4) L. R. 5 P. C. 500.

Court has proceeded chiefly upon sect. 822 of the same Code, which is one of those which relate to procedure in respect of writs of *capias*. That article appears to their Lordships clearly to imply that the decisions to which it relates are no more than interlocutory orders. If the decision of the superior Court on the matter therein referred to had been regarded as a final judgment, there would have been no necessity to give by this article special leave to appeal, because it would have been appealable under Article 1115, as pointed out by Mr. *Digby*. The real object of the article is to make special provision for an appeal to the Court of Queen's Bench from an interlocutory order of a particular kind. The Code gives by Article 1116 an appeal against certain other interlocutory judgments, but in these cases Article 1119 provides that there must be a preliminary motion before the Appellate Court, in order that that Court may decide whether the particular judgment falls properly within the terms of Article 1116. But an appeal from an interlocutory judgment under Article 822 was not to be subject to that provision, and hence the necessity for that article. The judgment of the Court of Queen's Bench upon a judgment of the Superior Court in this matter cannot be regarded as a final judgment within the meaning of Article 1178, unless it can be shewn that proceedings under the provisions of Article 796, and the subsequent articles of the Code which relate to the particular subject of *capias ad respondendum*, are so severed from the general suit that they are to be treated as something separate in their nature, and not as incident to the suit. Their Lordships are of opinion that the Code has not expressed that they are to be so treated, and that from their nature they are merely incidental to the suit and in the nature of process therein. They are, therefore, of opinion that the judgment of the Queen's Bench, which is the subject of this appeal, is not a final judgment within the meaning of the Code, and consequently that the appeal has not been regularly brought before Her Majesty in Council. It has been suggested that their Lordships may now recommend Her Majesty to grant, as they have unquestionably power to do, special leave to appeal; but they are of opinion that there are not before them sufficient grounds for making such a recommendation. They, therefore, think that the prayer of this petition must be granted;

J. C. 1880 GOLDRING v. LA BANQUE D'HOCHELAGA.

but, considering that the point is novel, and that the Court of Queen's Bench has seen fit to allow this appeal, they do not think it is a case for costs. Their Lordships will, therefore, humbly advise Her Majesty accordingly.

Solicitors for Plaintiffs: *Ashurst Morris & Co.*
Solicitors for Defendant: *Harris & Godwin.*

[PRIVY COUNCIL.]

J. C.* 1880 *Feb.* 11, 12.

CHARLES JAMES BARCLAY . . . . . PLAINTIFF;

AND

THE BANK OF NEW SOUTH WALES . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Pleading—Plea in Accord and Satisfaction—Demurrer.

To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the Plaintiffs, it was pleaded that a certain agreement had been come to between Plaintiffs and Defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration:—

Held, on demurrer, reversing the judgment of the Court below, that such plea was bad. It could not be assumed that an agreement, the Defendants' version of which was set out in the plea, had been accepted in accord and satisfaction.

APPEAL from an order of the Supreme Court (*Hargrave* and *Faucett*, JJ., *Martin*, C.J., dissenting) (March 10, 1879) that judgment be entered for the Respondents upon the Appellants' demurrer to the 6th, 7th, 10th, 12th, and 14th pleas, and upon the Respondents' demurrers to the Appellants' equitable replication to the Defendants' 6th, 7th, 10th, and 14th pleas.

The pleas are sufficiently set forth in the judgment of their Lordships. The case is reported in the Supreme Court Reports (N.S.), vol. ii. p. 1.

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Mr. *Watkin Williams*, Q.C., and Mr. *John Digby* (Mr. *Julian E. Salomons* with them), for the Appellants, in support of the demurrer and equitable replication, referred to *Lyall* v. *Edwards* (1); *Randall* v. *Roper* (2); *Mayne* on Damages [3rd Ed.], p. 468, quoting *Story* on Agency, par. 217c; *Bullen* and *Leake's* Pleading [3rd Ed.], pp. 478–479; *Payler* v. *Homersham* (3); *Luce* v. *Izod* (4).

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Respondents, contended that the 6th plea amounted to a plea of accord and satisfaction, and was a good answer to the causes of action to which it was pleaded. The remedy of the Appellants was under the agreement set out in the plea. As to the equitable replication, no grounds were shewn for setting aside unconditionally such agreement, which the parties moreover had acted upon.

Mr. *Watkin Williams* replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The Plaintiffs in this case are the *Commercial Bank* in *Tasmania*, suing by their public officer, and the Defendants are the *Bank of New South Wales*. The questions in this appeal arise solely upon demurrers to pleas and replications, and their Lordships therefore have only to deal with what appears on the face of the pleadings. The first count of the declaration is to this effect: "That one *Armstrong* had shipped from *Hobart Town*, in the said colony of *Van Diemen's Land*, certain goods to Messrs. *Brown & Son* at *Sydney*, and had drawn against the same a bill of exchange on the said Messrs. *Brown & Son* for the sum of £250, and annexed thereto the bill of lading of the said goods, and indorsed the same and the said bill of exchange to the said *Commercial Bank*, in order to procure an advance by the said bank against and on the security of the said bill of exchange and bill of lading, and retained and employed the said bank for reward to them in that behalf to collect the said bill of exchange, and to

(1) 6 H. & N. 337.
(2) 27 L. J. (Q.B.) (N.S.) 266.
(3) 4 M. & S. 423.
(4) 1 H. & N. 245; S. C. 25 L. J. (Ex.) 307.

J. C. 1880 BARCLAY v. BANK OF NEW SOUTH WALES.

receive payment of the same in *Sydney* from the said Messrs. *Brown & Son*, and upon such payment and not otherwise to deliver the said bill of lading to the said Messrs. *Brown & Son*." Then the Plaintiffs aver: "That thereupon, in order to carry out such retainer and employment, the said *Commercial Bank* indorsed and transmitted to their agents in *Sydney* (the Defendants having notice of the premises) the said bill of lading and bill of exchange, and for reward to the Defendants in that behalf retained and employed them to present for acceptance and to collect the said bill of exchange, and to receive payment thereof from the said Messrs. *Brown & Son*, and upon such payment and not otherwise to deliver the said bill of lading or goods to the said Messrs. *Brown & Son*, and the Defendants received the said bill of lading and bill of exchange, and accepted the said retainer and employment." The declaration avers that all conditions, &c., were performed, and the breach is thus stated:—"Yet the Defendants, contrary to their agreement and duty in that behalf, without obtaining payment of the said bill of exchange, delivered the said bill of lading to the said Messrs. *Brown & Son*, whereby they were enabled to and did obtain possession of the said goods without payment of the said bill of exchange, and the same has hence hitherto remained unpaid, and by means of the premises the said goods became wholly lost to the said *Commercial Bank* and to the said *H. F. Armstrong*, and the said *Commercial Bank* incurred divers large costs and expenses in and about defending an action which thereby accrued to the said *H. F. Armstrong* against the said *Commercial Bank*, and were compelled to and did pay a large sum to the said *H. F. Armstrong* as damages sustained by him by reason of the loss of the said goods as aforesaid." There are several other counts, the same substantially as this, having reference to different bills of exchange, and to these counts several pleas were pleaded, that on which the main question has been raised being the sixth plea, pleaded to the first, second, third, fourth, and fifth counts, which run thus: "The Defendants say that after the alleged receipt of the said bills of lading and bills of exchange by the Defendants, and the alleged retainer and employment of the Defendants as in the said counts respectively mentioned, a dispute arose between the Defendants and the said

Commercial Bank"—their Lordships here observe that it is not stated whether the dispute arose before or after the breach complained of—"as to the liability, contingent or otherwise, of the Defendants to the said *Commercial Bank* for any loss which might arise or happen to the said *Commercial Bank* in respect of the said bills of lading and bills of exchange in the said counts respectively mentioned; and it was thereupon agreed between the Defendants and the said *Commercial Bank* that, in consideration of the Defendants crediting the said *Commercial Bank* with the amount of the said bills of exchange in the said counts respectively mentioned, the said *Commercial Bank* should transfer to the Defendants all their right to the same, and all their remedies thereupon as against the acceptor or drawer, and also all their right to the goods comprised in the said bills of lading, and all their rights and remedies for the recovery of the same, and also all their rights and remedies against the captain and owners of the vessels mentioned in the said bill of lading for non-delivery of the goods comprised therein respectively according to the tenor and effect of the said bills of lading; and the Defendants say, that thereupon they did credit and thereby pay to the said *Commercial Bank* the full amount of the said bills of exchange, and the said *Commercial Bank* did transfer to the Defendants all their rights and remedies as aforesaid, and indorsed the said bills of exchange and bills of lading to the Defendants. And the Defendants further say, that subsequently they, as holders for value of the said bills of exchange, sued the said *H. F. Armstrong*, as drawer of the said bills of exchange, upon the said bills of exchange in the second, third, fourth, and fifth counts respectively mentioned, and recovered judgment upon the same against him in this honourable Court; and thereupon the said *H. F. Armstrong* sued the said *Commercial Bank* for the amount paid by him under the said judgment. And the Defendants say, that the amount paid by the said *Commercial Bank* to the said *H. F. Armstrong*, in settlement of the said action and the costs thereof, are the costs, expenses, and damages referred to in the said counts respectively, and that such costs, expenses, and damages arose in respect of the said bills of exchange so transferred and indorsed to the Defendants as aforesaid, and the full amount of which was duly paid to the said *Commercial*

J. C. 1880

BARCLAY v. BANK OF NEW SOUTH WALES.

Bank by the Defendants in pursuance of the said agreement, and not otherwise."

This plea was demurred to on the ground that it was not a good plea in accord and satisfaction, or indeed in any other view. Two of the learned Judges below have held that it was a good plea in accord and satisfaction. It is true that Mr. Justice *Hargrave* expresses himself somewhat doubtfully upon this point, and appears to think that possibly it is something more, but perhaps it may be taken that he does not substantially differ from Mr. Justice *Faucett*, who is of opinion that the plea amounts to a good plea of accord and satisfaction. The Chief Justice is of opinion that the plea is bad. The plea alleges a certain agreement to have been come to between the Plaintiffs and Defendants after certain disputes arose. In terms it does not admit, nor does it deny, the breach which is alleged in the declaration. It does not in terms state that the agreement set out in the plea was accepted by the parties in accord and satisfaction of the causes of action in the declaration mentioned, but it has been argued that the plea upon the whole of it must be construed as meaning this. It has been also argued that it may be construed in a totally different manner, namely, as substituting an agreement for the original agreement set out in the declaration; but inasmuch as this latter contention has not been insisted upon, their Lordships will confine themselves to considering whether it does amount to a plea in accord and satisfaction.

It appears to their Lordships that the agreement set out in the plea does not necessarily, and on the face of it, amount to an accord and satisfaction; but that it is consistent with this agreement that it may have been come to, and yet that the Plaintiffs may not have intended to accept it in accord and satisfaction of the causes of action stated in the declaration. The only ground on which it can be plausibly argued that the agreement must, on the face of it, be taken to be in accord and satisfaction, is the assumption that in any event the *Commercial Bank* could not obtain more than the value of the bills of exchange, and that that value is stated to have been paid. But their Lordships are of opinion that it cannot be taken, upon the proper construction of the counts to which the plea is pleaded, that no damages could have

arisen from the breach of contract on the part of the Defendants beyond the sum of money for which the bills were drawn, although it may possibly be that no greater damages may be given in the trial by a jury. It appears to their Lordships impossible to say, as a matter of law, that in consequence of the Defendants' breach of this agreement, admitted as it is by the plea, in allowing *Brown & Co.* to obtain possession of the goods without payment of the bills of exchange, no further damage can have accrued to the Plaintiffs than the mere value of the bills of exchange. That being so, the agreement, on the face of it, does not appear to be an agreement necessarily in accord and satisfaction. Undoubtedly it might have been accepted in accord and satisfaction; but there is no allegation in the plea that it was so accepted, and their Lordships cannot help thinking that the allegation is purposely omitted—at all events, it cannot be imported into the plea.

Their Lordships must observe that they cannot agree with the view expressed by Mr. Justice *Faucett*, who observes: "I at first thought that this plea did not amount to a plea of accord and satisfaction, because it contained no express statement to that effect, and therefore that it went merely to damages. But, as the whole matter rested on written communications, I think the effect of these written communications has been properly left to be determined by the Court." It appears to their Lordships that such is not the effect of the plea. It does not set out written communications the effect of which may be determined by the Court. It sets out no written communications at all, but professes only to give the Defendants' version of a certain agreement which the plea does not even aver to have been in writing. If the letters which constituted the agreement had been set out, it might have appeared on the face of them that they constituted an agreement which might be taken as one in accord and satisfaction; but inasmuch as they have not been set out, that cannot be assumed.

On these grounds, their Lordships are of opinion that this plea is bad. It has been admitted on both sides that there is substantially little distinction between the first count and the second, third, fourth, and fifth counts, and that the seventh and tenth

J. C. 1880 BARCLAY v. BANK OF NEW SOUTH WALES.

pleas substantially stand or fall by the argument in support of or against the sixth plea. The same appears to their Lordships substantially to be the case with respect to the fourteenth plea, which is pleaded to the eighth count. The demurrer on the twelfth plea has been abandoned, and the matter therefore stands thus: that in their Lordships' view the judgment appealed against is wrong, in as far as it directs that judgment be entered for the Defendants upon the Plaintiffs' demurrers to the Defendants' sixth, seventh, tenth, and fourteenth pleas; and that such judgment should be entered for the Plaintiffs.

That being so, no question arises with regard to the replication of the Plaintiffs, which is also demurred to on the part of the Defendants, and in respect of which it follows that the Plaintiffs would be entitled to judgment.

For these reasons, their Lordships will humbly advise Her Majesty that the judgment below be reversed as far as it relates to entering the judgment for the Defendants upon the demurrers to the sixth, seventh, tenth, and fourteenth pleas, and also upon the demurrer to the Plaintiffs' replication to the sixth, seventh, tenth, and fourteenth pleas, and that the judgment be entered for the Plaintiffs upon those pleas, and the replication to them; the costs, as usual, to follow the result.

Solicitors for Appellants: *Henry Kimber & Co.*
Solicitors for Respondents: *Waltons, Bubb & Walton.*

[PRIVY COUNCIL.]

OCTAVE BOURGOIN AND OTHERS . . . APPELLANTS;

AND

LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL . . . . . .
THE ATTORNEY-GENERAL (INTERVENING PARTY) . . . . . } RESPONDENTS.
THE ATTORNEY-GENERAL (OPPOSANT) .
LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL . . . . . .

FOUR CONSOLIDATED APPEALS.

J. C.*
1880
Feb. 12, 13, 14, 17, 18, 26.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, IN THE DOMINION OF CANADA.

Railway Act, 1868—*Validity of Award—Compensation—Invalid Transfer by Railway Company — Quebec Act*, 39 *Vict. c.* 2—*Power of Provincial Legislature.*

Held, that an award made under "*The Railway Act*, 1868," awarding to the Respondent railway company as damages for expropriated land "the sum of $35,013 *plus* $100 per month from this date, payable on the first of each month until the said company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land and constructed a culvert to protect the said watercourse," is invalid upon the face of it, in respect of the monthly payment directed, which is not rent, but in the nature of an assessment of damages payable *in futuro*, contingent on a future event and therefore uncertain; and also in respect of the direction to construct a culvert, which was not within the functions of the arbitrators.

Under the Act it is not competent to the arbitrators to impose the payment of a rent or periodical sum at all. Their duty is, except when the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same

---

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.

1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

under sub-sect. 27, or into Court under sub-sect. 34 of sect. 9 of the Act, in order to entitle the company to possession under the 27th, or to confirmation of title under the 34th and 35th sub-sections.

By a deed (16th of November, 1875) the Respondent company, which had been originally incorporated under *Quebec Act* 32 Vict. c. 55, but which was subsequently declared a federal railway by *Canadian Act* 36 Vict. c. 82, and became subject to *Canadian Railway Act*, 1868, purported to transfer such federal railway with all its appurtenances and all its property, liabilities, rights, and powers to the *Quebec* Government, and agreed to dissolve itself as soon as such transfer should be perfected.

By *Quebec Act* 39 Vict. c. 2, such transfer was confirmed, the enterprise of the Respondent company was combined with that of another company which had made a similar transfer to the Government, the Respondent company was dissolved, and its property vested in a new company with a new title and a different organization, which was thereby declared to be subject to provincial legislation :—

Held, that both the deed and the enactment 39 Vict. c. 2, were invalid, and inoperative to affect the obligations of the company.

Such a transfer is *ultrà vires* a railway company, by the law of the province of *Quebec* as defined by Art. 369 of the Civil Code; and by the special legislation affecting the Respondent company, read in connection with the *British North America Act*, 1867, sect. 91 and sect. 92, sub-sect. 10, the same could not be validated to all intents and purposes by an Act of the provincial legislature. An Act of the Parliament of *Canada* was essential in order to give to such transfer full force and effect; whatever may have been the inchoate rights created thereby as between the parties thereto.

CONSOLIDATED APPEAL from four judgments of the Court of Queen's Bench given upon four appeals from the Superior Court for *Lower Canada*, District of *Montreal*, numbered 13, 117, 141, and 144 respectively.

The appeal arose out of four actions, the first of which, No. 693, was brought in the Superior Court by the Respondent company against the four Appellants, and *Damase Masson* and others who were parties *mis en cause* to the action. The second, No. 1213, was brought in the same Court by the Appellants against the company.

The third action arose out of the action No. 1213, and was an appeal, distinguished as No. 117, from the decision of the Superior Court in that action, and was brought by *David A. Ross*, Attorney-General for *Canada*, whose predecessor in office had intervened in the said action in the Superior Court. The Attorney-General appealed, but severed in his appeal from the appeal of the company from the said decision. This latter appeal was No. 144.

The fourth action arose out of the action No. 693, and was an opposition *afin de distraire*, lodged by the predecessor in office of the Attorney-General against an execution under a writ of *fieri facias de bonis et de terris*, issued at the suit of the Appellants, to recover their costs in the action No. 613. The appeal of the Attorney-General from the judgment of the Superior Court in this action was distinguished as No. 141.

Appeal No. 13 was an appeal by the Respondent company against the judgment of the Superior Court in favour of the Appellants in action No. 693.

The company was originally incorporated as a provincial railway company by the 32 Vict. c. 55, of the *Quebec* Legislature, under the name of "*La Compagnie du Chemin à Lisses de Colonisation du Nord de Montréal;*" and afterwards, by virtue of the provisions of an Act, 36 Vict. c. 82, of the Parliament of the Dominion of *Canada*, became a federal company authorized to construct a railway uniting two provinces and passing from the province of *Quebec* into the province of *Ontario*. By virtue of the provisions of the 38 Vict. c. 68, the name of the company was changed to its present name, "*La Compagnie du Chemin de Fer de Montréal, Ottawa et Occidental.*"

The company, being unable to complete its authorized works, executed a deed, dated the 16th of November, 1875, which was afterwards ratified by an Act of the *Quebec* Legislature, 39 Vict. c. 2, s. 8, assented to the 24th of December, 1875, whereby after it had been declared that the company was unable duly to execute the said works, the said works were abandoned by the company, and the company, for the considerations therein mentioned, duly conveyed all its rights in the works theretofore executed and in the lands acquired or in course of acquisition for the said railroad to the *Quebec* Government.

The *Quebec* Government then took upon itself the construction of a line of railway (authorized by the Act, 39 Vict. c. 2, of the *Quebec* Legislature), part of which traverses the tract of country in which the company had an exclusive interest, and for the construction of which last-mentioned line of railway the incomplete works of the company were used. This last-mentioned line of railway is the present *Quebec, Montreal, Ottawa and Occidental*

J. C.
1880
BOURGOIN
v.
LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

Railway, which at the time of the passing of the last mentioned Act did not extend beyond the limits of the province of *Quebec*.

On the 9th of October, 1873, proceedings of expropriation were commenced by the company for the expropriation of part of a certain stone quarry situated in the village of *Côte St. Louis*, county of *Hochelaga*, in the province of *Quebec*.

The freehold of the stone quarry was vested in *Dame Eleanor Hingston*, the widow of one *Richard Smith*, and had been leased to the Appellants by a lease, dated the 23rd of July, 1873, for five years, with a preferential right to the lessees, at the expiration of the term, to continue their lease for an indefinite period. The proceedings were taken by the company against Mrs. *Smith*, and arbitrators were appointed to determine the amount of compensation due to her from the company. On the 11th of November, 1874, the arbitrators unanimously awarded to Mrs. *Smith* the sum of $5,522 : 67*c.* as compensation for her proprietary rights in so much of the quarry as was taken by the company.

While the proceedings against Mrs. *Smith* were pending, and on the 24th of April, 1874, the Appellants claimed to intervene in the arbitration, and made a claim for $30,286 : 75*c.*, but the arbitrators refused to consider such claim.

On the 14th of November, 1874, by a warrant issued by one of the Judges of the Superior Court for the district of *Montreal*, the lands in question became and were vested in the company as proprietors thereof, and the lands remained since the warrant so vested in the company until the 24th day of December, 1875, when they became vested in Her Majesty on behalf of the province of *Quebec* as before mentioned.

On the 22nd of February, 1875, the railway company commenced proceedings of expropriation by giving notice to the Appellants who were in possession of the piece of land in question "as proprietors thereof and as being the persons authorized by the statutes in that behalf, and particularly the 31 Vict. c. 68 (*Canada*), to convey to the said company," that it required the land in question for the purposes of the railway, that it was about to take possession of it, that it was ready to pay $1000, and that if that offer was not accepted it nominated *Masson* its arbitrator, "to fix the compensation or indemnity to be paid by the said

company for the said piece of land, and for all damages resulting from the taking possession of the same, and to settle (*régler*) all questions which may arise between you" (meaning the Appellants) "and the said company touching the premises."

The Appellants thereupon appointed *Frigon* their arbitrator, and on the 3rd of March, 1875, *Masson* and *Frigon* appointed *Comte* third arbitrator according to 31 Vict. c. 68, s. 9, sub-s. 16; who, however, died before any award had been made.

Masson and *Frigon* then nominated *Valois* in place of *Comte* as third arbitrator, and on the 28th of July, 1876, the arbitrators made their award, *Masson* dissenting.

The award and the claim of the Appellants before the arbitrators are sufficiently set out in the judgment of their Lordships.

By action No. 693 the company prayed that the award might be declared null and void and annulled, and that the company might be exonerated and discharged from all obligations to pay the amount of the award, principal, interest, or costs, and also that the arbitrators, the *mis en cause* in the said action, might be summoned to appear before the Court to see the award declared null and void and annulled, and asked for costs from the Appellants in any event and from the parties *mis en cause* if they opposed.

The Appellants, except *Masson*, pleaded in effect that the award in question in the cause had been rendered legally and in accordance with law on the subject of railways.

The Plaintiff company filed a replication taking issue in the said pleas.

The Superior Court of *Montreal* (*Johnson*, J.) dismissed the action with costs.

On the 14th of December, 1878, the Court of Queen's Bench (*Tessier*, J., dissenting) gave judgment in favour of the appeal brought by the company. The decision of the Court was based, among other considerations, on the ground that the arbitrators had no right to impose on the company the obligation of executing any works, and especially works for the benefit of adjoining quarries, their authority being limited to determining the compensation due to the Appellants. Moreover, the judgment rested also on the following grounds:—That the arbitrators had no authority to impose on the company the payment of an annual

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

sum, either as a penalty or as damages for an indefinite period, and until the execution of works of which neither the nature nor the extent was indicated. That the Appellants being only tenants, the award could not order the payment to them of a rent which would be perpetual if the works mentioned could not be performed. That the award is not final in its nature and does not put an end to all chances of litigation between the parties, but leaves the door open to further disputes. That the award contains a fatal and material error in treating the Appellants as the proprietors of the quarry and granting them a compensation for the value of the land itself. And lastly, that the amount of the compensation, consisting in part of a monthly rent, could not be deposited in Court under the *Canadian Railway Act*, 1868, s. 9, sub-s. 34.

Action No. 1213, in which the pleadings raised substantially the same questions as to the validity of the award as were raised in action No. 693, was brought by the Appellants against the railway company to enforce the award and recover the moneys payable thereunder. In this action the Attorney-General for *Quebec* claimed to intervene on the ground that by the deed of the 16th of November, 1875, the material provisions of which are set out in their Lordships' judgment, the company had conveyed to Her Majesty the property in respect of which the award had been made. The Superior Court allowed the claim of the Appellants, and rejected the intervention of the Attorney-General.

The Court of Queen's Bench (*Tessier*, J., dissenting) allowed the appeal of the company and the Attorney-General (Nos. 144 and 117), annulled the award, and allowed the intervention of the Attorney-General. Their reasons were the same as those given in the action No. 693.

On the 22nd of May, 1877, the Appellants caused to be issued a writ of *fieri facias de bonis et de terris*, commanding the sheriff of *Montreal* to levy upon the goods and chattels and lands and tenements of the company the sum of $591. 50*c*., the amount of the costs awarded to the Appellants in suit No. 693. The sheriff returned that he had been unable to find any goods and chattels belonging to the company, but had seized certain immoveables, a schedule of which was annexed, and that an opposition *afin de*

distraire on the part of the Attorney-General had been lodged in his hands, by reason whereof he was unable to proceed to a sale of the immoveables under the writ. A small part of the immoveables consisted of certain lands which previously to the transfer formed part of the undertaking of the company. The remainder of the immoveables consisted of lands, rolling stock, and railway plant purchased by the *Quebec* Government subsequent to the transfer.

In that opposition the Attorney-General claimed the whole of the property seized as the property of the Queen for the use of the province of *Quebec;* and further alleged that, inasmuch as the appeal against the judgment in No. 693 was still pending, the proceedings in execution of that judgment were thereby suspended. The Appellants pleaded a dilatory exception, and also to the merits:—

1st. That even if this 39 Vict. c. 2 (*Quebec*), under which the opposing party made title, were valid, that Act confirmed the transfer of the 16th of November, 1875, and invested the province of *Quebec* with all the property, rights, and obligations of the railway company, and that if the said railway company, as the opposing party contends, then ceased to exist, action 693, which was subsequent to that transfer, must have been brought by the province of *Canada* under the name of the company, and being the real Plaintiffs in the action, as well as the assignees of the whole property and obligations of the nominal Plaintiff, the opposing party was the debtor of the now Appellants for the taxed costs of that action, and could not oppose the sale any more than the Plaintiff company could.

2nd. That the Act 39 Vict. c. 2, under which the opposing party made title, and all agreements therein referred to, could not confer on the province of *Quebec* any title to the goods seized in this cause, because, by the 36 Vict. c. 82 (*Canada*), the railway had been declared a work for the general advantage of *Canada*, and was held incorporated under the *Canada Railway Act*, 1868, and no part of the *Quebec Railway Act*, 1869, applied thereto: that afterwards, by 38 Vict. c. 68 (*Canada*), its name was changed to that under which it now sued; that thus constituted, it could not enter into any of the agreements mentioned in the 39 Vict. c. 2 (*Quebec*), without being authorized or ratified by the Parliament

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

of *Canada*, which had never been done, so that they remained without any legal effect whatever.

They further pleaded that the Attorney-General as such had no powers except those conferred by the Legislature, and that there was no legislation justifying his opposition.

The opposing party joined issue on these pleas.

Both the Superior Court and the Court of Queen's Bench allowed the opposition, and declared the lands seized to be the property of the Queen for the province of *Quebec*, and the seizure illegal and invalid.

Mr. *Doutre* (of the Canadian Bar), and Mr. *Fullarton*, for the Appellants, contended that the award was valid and binding, and sufficient both in form and substance. The arbitration proceedings were regulated by the Railway Statutes of *Canada*, and not by those of the Province of *Quebec*. See *Canada Railway Act*, 1868, 31 Vict. c. 68, s. 7, sub-s. 6, and s. 9, sub-ss. 10, 17. As to the discretion and powers of the arbitrators, reference was made to *Great Western Railway Company* v. *Baby and Others* (1), in which the railway company was directed by an award to do something which they were bound by agreement to do, whereas here they were directed to do something which they were bound by law to do. Reference was also made to the case of *Chemin de Fer Grand Central* v. *Rebois*, *Sirey's Receuil Générale*, 1858, p. 831.

Mr. *Benjamin*, Q.C., and Mr. *Jeune*, for the Respondents, referred to *Ware* v. *The Regent's Canal Company* (2); *Skipworth* v. *Skipworth* (3); *Russell* on Arbitration [last Ed.], p. 307, sect. 9, c. v.; *Civil Code*, sect. 407; *Great Laxey Mining Company* v. *Clague* (4).

Mr. *Doutre* replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

The only question which has been fully argued upon the four appeals consolidated in this record is whether the judgment of

(1) 12 Q. B. Up. Can. 106, 114, 121, 131.
(2) 9 Ex. 395.
(3) 9 Beav. 135.
(4) 4 App. Cas. 115.

the Court of Queen's Bench rendered in the first suit, No. 693, was right in annulling and setting aside the award of the 28th of July, 1876, upon either of the grounds stated in it. As to one of those grounds, which proceeds upon the assumption that the lump sum of $35,013 awarded to the Appellants included the whole value of the land, and not merely the value of their interest as lessees, it is not necessary to say anything, because that objection has not been pressed. The question, therefore, is reduced to this: can the judgment be supported on the other ground taken? Their Lordships confined the argument, in the first instance, to that question, because they thought that if the award was found to be invalid on the face of it, that finding would go far to dispose of all or most of the questions which have been litigated between the parties. They will, therefore, for the present, confine their attention to the first of the suits and the final judgment therein, nor will they go into the facts further than is required in order to elucidate the single point to be now determined.

The Appellants are four persons holding a quarry, as lessees, under a Mrs. *Smith*. They are sometimes described as working together in two partnerships of two each, as "*Bourgoin et Fils*" and "*Bourgoin et La Montague*," but for all practical purposes they may be treated as the four joint lessees of the quarry. The Respondents, who were the Plaintiffs in the suit, are a railway company, styled on the record "*The Montreal, Ottawa, and Western Railway Company.*" This company was incorporated originally under another title, viz., "*The Montreal Northern Colonization Railway Company*," by an act of the Legislature of the province of *Quebec* (32 Vict. c. 55), and was governed by that and a subsequent statute of the same Legislature, 34 Vict. c. 23. It was, therefore, in its inception a provincial railway. In 1873, however, the Parliament of *Canada*, by Act 36 Vict. c. 82, declared this railway to be a federal enterprise, and by a subsequent statute (38 Vict. c. 68), changed the name of the company to that which it bears on this record. Hence, when the proceedings which resulted in the award in question were commenced, the railway had become a federal railway, and the Respondent Company was subject to and governed by the provisions of the Canadian statute known as "The *Railway Act*, 1868."

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

It appears that, in one or other of the above two states of existence, this company had proceeded in the usual way to ascertain the compensation payable to the lessor, Mrs. *Smith*, in respect of her freehold interest in the land to be expropriated. The Appellants intervened, and sought to have the sum payable to them for compensation in respect of their interest as lessees ascertained by the same proceeding. The company declined to accede to this, and having settled the amount of compensation payable to Mrs. *Smith*, took possession of the quarry. The Appellants upon that instituted certain proceedings, in order to compel the company to ascertain the compensation due to them; those proceedings were ultimately successful, and thereupon the company gave the notice of the 22nd of February, 1875, which was the foundation of the proceedings that resulted in the award. Their Lordships think it right here to observe that, in their opinion, there is nothing exceptional in that notice, nothing which supports the suggestion that its terms were varied by reason of the company having previously, and perhaps wrongfully, taken possession of the quarry. It appears to them to be the usual notice contemplated by "the *Railway Act*, 1868." The words which have been so much relied on as authorizing the arbitrators to settle all questions between the parties have been taken *verbatim et literatim* from the 10th sub-section of the 9th section of that statute. After the service of the notice, arbitrators were appointed and the award in question was made, and the only two documents besides the notice which seem to be in any way material for the decision of the question now to be determined are, the award itself and the claim of the Appellants.

The material passage in the award, upon which the whole question turns, is that whereby the arbitrators, after stating that they had proceeded to assess the compensation to be paid by the company to the Appellants for the piece of land described, and for all the damages resulting from the taking possession of the same, and had visited the said piece of land, and estimated with care and established the value of it, and the amount of the said damages, proceeded to award—

The sum of $35,013, *plus* $100 per month from this date, payable on the first of each month, until the said company shall have

set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse, as being the amount of compensation to be paid by the said *Montreal Northern Colonization Railway Company*, now called "the *Montreal, Ottawa, and Western Railway Company*," to the said "*Bourgoin et Fils*" and *Bourgoin* and *La Montague* for the said piece of land, and for all the damages resulting from the possession of the same."

The objection taken to the award is now confined to that portion of the passage just quoted which includes and follows the word "plus," and relates to what the arbitrators seem to have considered as wholly or in part the compensation due to the Appellants in respect of that portion of their claim which was comprehended in the words of its 4th head, and claimed damages for the watercourse diverted by the company and for pumping and work to be done at the rate of $600 per annum for eight years (which they treated as the probable duration of their lease), and amounting to a gross sum of $4800. Their Lordships, after full consideration of this case, and of the learned arguments upon it, have come to the conclusion that, in respect of the passage in question, the award is bad upon the face of it. The case of the Appellants was very ingeniously put, particularly by Mr. *Fullarton*. His argument was to this effect. He said that the arbitrators probably conceived that, if they gave the full sum claimed on the assumption that the interruption of the drainage would last for the whole duration of the lease, fixed at eight years, they might be doing great injustice to the company; that by virtue of the 6th sub-section of the 7th section of "the *Railway Act*, 1868," which is in these words:—

"To construct, maintain, and work the railway across, along, or upon any stream of water, watercourse, canal, highway, or railway which it intersects or touches; but the stream, watercourse, highway, canal, or railway so intersected or touched shall be restored by the company to its former state, or to such a state as not to impair its usefulness;"

the company was, to the knowledge of the arbitrators, under a statutory obligation to restore the watercourse; that they assumed that the company would perform that statutory obligation as soon

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

as possible; and accordingly assessed the damages in the manner complained of in ease and for the supposed benefit of the company; and further, that it was competent to them so to do.

The motives of the arbitrators, whatever they may have been, cannot validate their act if that were *ultra vires*. And the first observation which their Lordships have to make is that, as they read the statute, it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all. The word "rent," no doubt, occurs in several of the sub-sections of sect. 9; but their Lordships think that the use of that word is always to be explained by a reference to the provisions contained in the sub-sects. 3, 4, and 8, and that in every case, except those in which the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," it is the duty of the arbitrators to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under the 27th sub-section, or into Court under the 34th sub-section of the 9th section of the Act, in order to entitle the company to possession under the 27th, or to a confirmation of title under the 34th and 35th sub-sections. It appears, moreover, to their Lordships, that even if a rent-charge could be given by way of compensation in circumstances like these to the expropriated parties, it has not been done in this case; that the monthly sum awarded is not, in any sense of the term, a rent; that it is more in the nature of an assessment of damages payable *in futuro*, and does not in any point of view fall within the provisions of the Act.

A further objection to this part of the award is, that it makes the monthly payment contingent on the completion and erection of certain works, and thus introduces an element of uncertainty which would of itself be a fatal objection to the award. That it is open to the objection of uncertainty is shewn by the observations which have been quoted from the judgment of Mr. Justice *Tessier*, who decided in favour of the Appellants. The learned Judge assumes that if the culvert is not constructed the annual sum will continue to be payable, not only to the Appellants and their assigns, but to the reversioner, Mrs. *Smith*. The learned

counsel for the Appellants repudiated that construction; but the fact that it was put by the learned Judge upon the document goes to prove that there is some degree of uncertainty in the award. Again, the duration of the Appellant's interest is uncertain, in that they held their lease with the power of renewing it so long as any stone remained to be worked. They might thus prolong the time during which the monthly sum would be payable, by omitting to work the stone, although no doubt the company would have the power to put an end to their liability by doing the works prescribed.

Lastly, there seems to their Lordships to be a fatal objection to the award in the direction to the company to restore the water-course in a particular manner, and that by the construction of a culvert. They conceive that it was not within the functions of the arbitrators to prescribe how the company was to relieve itself from the statutory obligation imposed upon it by the 6th sub-section of the 7th section, or to cast upon them the construction of a culvert which possibly might not be necessary.

It is right now to notice shortly certain authorities which have been invoked in the course of the arguments at the Bar. The Chief Justice referred to four cases reported in the 12th Queen's Bench Reports, *Upper Canada*, as supporting his judgment, whereas the learned counsel for the Appellants has treated them as authorities in his favour. If those decisions are opposed to the decision of the Court of Queen's Bench of *Quebec* in this case, that would only shew that there is a conflict of authority between the highest Courts of the two provinces, and that it is for their Lordships to decide between them. But their Lordships think that in truth there is no conflict at all, and that the cases in question do go to support the judgment of the Chief Justice in this case. It is to be observed that in all four cases the award was set aside. There is, therefore, no affirmative decision that a clause of this kind in an award is good. The only passage in the judgments in question which seems to their Lordships capable of being treated as in favour of the Appellants is that at page 114 of the volume, in the case of the *Great Western Company* v. *Baby*. Chief Justice *Robinson* there says:—

"The second and third objections seem also to have been satis-

J. C. 1880 BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

factorily answered. It is not the devisees who are moving against the award, on the ground that some things are directed in their favour which cannot be enforced against the company; it is the company who are complaining of the extravagance of the award. If they choose to object against the making and maintaining the tank spoken of, and to keeping open the Ferry street, and can successfully resist both or either of them, that would only shew that, so far as the amount of the award can have been influenced by assuming that those things were to be done, the devisees may have reason to complain that they have been deluded by promises of advantages which cannot be secured to them, and that the sum awarded as the value of their property should therefore have been larger, as they cannot reckon upon enjoying these benefits, which the arbitrators may have taken into account as considerations in their favour, tending to diminish the sum to be awarded."

He goes on to say,—

"Besides, these are not things which the arbitrators have taken upon themselves to direct. They seem rather to have inserted them as being things understood between the parties, and which they had therefore taken into consideration in estimating the damages."

Then, at page 121, after saying that the award must be annulled upon another ground, he says,—

"But, to avoid occasion for question upon any future award, we would suggest that it should be clearly expressed, in the first place, that the sum awarded is given for the value of the lands and tenements or private privileges proposed to be purchased, or for the amount of damages which the claimant is entitled to receive in consequence of the intended railroad in and upon his lands (as the case may be), and that the award should either be silent in regard to any other matter on which the statute gives no authority to the arbitrators to give a direction, or that, if the estimate has been influenced by anything which the company has engaged to do in order to lessen the inconvenience, it should be plainly expressed that the company have undertaken to do it, and the particular thing should be so defined as to leave no uncertainty, and no room for future litigation as to what is to be

done or allowed by the company, and at what particular part in their work and in what manner it is to be done."

Therefore this judgment proceeded upon the fact that the company had agreed and offered to do certain things, not that the arbitrators had imposed upon this company the obligation to do them, and it points out that the award would be more correctly drawn if it had taken no notice at all of the works in question, or had stated that the company had voluntarily undertaken to perform them. It gives no countenance to the doctrine that it is competent to arbitrators to impose such an obligation as of their own authority.

Again, the case cited from *Sirey's* Collection seems to be distinguishable from the present in the manner in which Chief Justice *Dorion* has pointed out. There a gross sum was awarded, but that gross sum was made reducible if the company should do something which, as in that Canadian case, they had undertaken to do. The case is certainly distinguishable from the present, both because the compensation awarded was one sum payable at once, and because the company had undertaken to do the works in question. Several other French decisions have been cited by Mr. Justice *Tessier* in support of his view of this award, but it appears to their Lordships impossible to reconcile the broad principle which he seems to deduce from them, viz., that objections of this kind can only be taken by the person expropriated, and not by the body that expropriates, with the *Railway Act* of 1868 and its provisions. Their Lordships think that this case ought to be decided upon Canadian legislation and upon Canadian jurisprudence. For that reason they do not notice the case from the *Isle of Man*, which was cited by Mr. *Benjamin*.

The only remaining question to be considered is one which was suggested in the course of the argument, viz., whether the objectionable part of the award is severable from that which awards to the Appellant the sum of $35,013, so that the Appellants may recover that, waiving their right to the rest of the compensation awarded. The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the Appellants, their Lordships are of

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

opinion that the award is not severable in the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "*le montant de la compensation à être payée pour ledit morceau de terre, et pour tous les dommages résultant de la possession d'icelui.*" And if they were severed a question might arise, as Mr. *Benjamin* has argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the Appellants under the fourth head of their claim.

This being their Lordships' view, they think that the decision of the Court of Queen's Bench, which annulled and set aside the award as invalid on the face of it, is correct. They have come to that conclusion with considerable regret, because they feel that the Appellants were entitled to a fair compensation for the expropriation of their quarry, and that now, after a vast amount of expensive litigation, they are as far as ever from receiving that compensation. Their Lordships do not say that the fault is wholly that of the company or wholly that of the Appellants; but the lamentable result remains, and they can only express their hope that in some way or another means will be found to give the Appellants a fair compensation for the expropriation of their quarry, and for the damages which they have sustained thereby. Their Lordships, however, can but decide this question on its legal merits, and they feel that it is of great importance that arbitrators, with the large power given to them by "the *Railway Act*, 1868," should be kept within the limits of their authority.

The conclusion to which their Lordships have come seems to dispose, not only of the first appeal, but of most of the other questions raised on the record.

Mr. *Doutre* then intimated that, after consultation, the counsel for the Appellants had come to the conclusion that even if the award were pronounced to be bad, that could affect only two of the appeals, and that they were desirous to argue the two other appeals. After some discussion their Lordships assented to the adoption of this course. Those appeals were accordingly argued.

Mr. *Doutre*, and Mr. *Fullarton*, for the Appellants.

Mr. *Jeune* (Mr. *Benjamin*, Q.C., with him), for the Respondents.

Reference was made to *Yeo* v. *Tatum* (1); *Gardner* v. *London, Chatham, and Dover Railway* (2); *Richmond Waterworks* v. *Richmond Company* (3); *Great Western Railway Company* v. *The Birmingham and Oxford Junction Railway* (4).

On the 26th day of February the following judgment of their Lordships (5) was delivered by

SIR JAMES W. COLVILE:—

The judgment of their Lordships, which was delivered on the 14th instant, and ruled that the award of the 28th of July, 1876, was bad on the face of it, disposed, except as to costs, of the appeals numbered 13 and 144 respectively, and of all the questions on this record between the Appellants and the Respondent company.

It seemed, moreover, to leave to the Appellants no substantial interest, other than costs, in the rest of the litigation. Their counsel, however, expressed a desire to argue the remaining appeals (Nos. 117 and 141), and satisfied their Lordships that they were entitled to do so. Those appeals have accordingly been heard, and their Lordships have now to give judgment upon them. In order to see clearly what are the questions raised by them, it is necessary to refer shortly to some of the proceedings in the two actions numbered respectively in the Superior Court 693 and 1213.

In the latter of these, which was brought by the Appellants against the company in December, 1874, in order to recover the amount due on the award, the Respondent, the Attorney-General, intervened in the month of February, 1878. The cause was heard on the 18th of April, 1878, by Mr. Justice *Mackay* in the Superior Court against both the company, the Defendants, and the Attorney-General as intervenor, and the judgment of that Court dismissed

(1) Law Rep. 3 P. C. 696.
(2) Law Rep. 2 Ch. 201.
(3) 3 Ch. D. 82.
(4) 2 Phill. 597.
(5) Sir *Robert P. Collier* was not present.

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

the intervention, and condemned the company to pay to the Appellants the amount due on the award. From this judgment the company and the Attorney-General appealed separately. The Court of Queen's Bench reversed the judgment of the Superior Court against the company, and the appeal of the Appellants against so much of their judgment (No. 144) has already been disposed of. The appeal of the Attorney-General was also allowed, and the judgment of the Superior Court reversed as against him, but on the ground that the intervention, though legally competent, was unnecessary, without costs. Hence the appeal No. 117.

Again, the Superior Court, by its judgment in suit No. 693, wherein the company sued to set aside the award, dismissed that suit with costs. The company appealed against that judgment, and has succeeded both in the Court of Queen's Bench and here in getting it reversed. The date, however, of the judgment of the Superior Court was the 30th of April, 1877; the appeal against it was not lodged until the 5th of October following, and intermediately, *i.e.*, on the 22nd of May in that year, the Appellants issued a writ of execution for their costs, under which the sheriff seized certain lands, rolling-stock, and other property as belonging to the company. On the 17th of January, 1878, the Attorney-General filed an "*opposition à fin de distraire*," by which he claimed the whole of the property seized as the property of the Queen for the use of the Province of *Quebec*. The Appellants filed their contestation, and on the 31st of May, 1878, Mr. Justice *Johnson* pronounced the judgment of the Superior Court, which upheld the opposition; declared that all the lands seized were the property of Her Majesty for the use of the province of *Quebec*; that accordingly the seizure of the lands, immoveables, and accessories in question was null, void, and illegal, and granted *main levée* thereof to the opposant, with costs against the contestants, the present Appellants. That judgment was, on appeal, confirmed by the Court of Queen's Bench, and hence the appeal No. 141.

The determination of both these appeals mainly depends on the effect to be given to the transaction between the company and the Government of *Quebec* which is embodied in the notarial act or deed of the 16th of November, 1875, and in Act 39 Vict. c. 2, of

the Legislature of *Quebec*. The parties to the deed are stated to be Her Majesty the Queen, represented by the secretary of the province of *Quebec*, "acting as well for and on behalf of Her Majesty as for and on behalf of the province of *Quebec*, party hereto of the first part, hereinafter called 'the Government,' and the *Montreal, Ottawa, and Western Railway Company*, described as a body politic and corporate, duly incorporated by statutes of the province of *Quebec* and of the Dominion of *Canada*, &c., party hereto of the second part, hereinafter called 'the Company.'" The deed, after reciting the nature of the enterprise and the commencement of the work, and that the company was then unable to proceed further with the construction of the railway by reason of certain bonds not being negotiated; and that the Government was willing to assume and complete the construction of the said railway upon such terms and conditions, and in such manner and within such time as the Government might deem expedient, and for that purpose to acquire from the said company all its rights and assets, and to take upon itself the legitimate liabilities of the company, and to repay the disbursements of the company in manner and form and to the extent thereinafter described; and that in consideration thereof the company had agreed to transfer and convey such rights and assets to the Government also upon the conditions thereinafter expressed—proceeds to state, in different clauses, the covenants and agreements into which the parties had entered before the notary. The material clauses are the 1st, 2nd, 4th, 7th, 8th and 9th.

By the 1st, the company granted, sold, and conveyed to the Government all its right, title, and interest in the uncompleted railway, with all lands acquired or bonded for right of way, stations, and other purposes, all bridges, piers, abutments, forms, and other things expressly mentioned, stating their intention to be "to divest the company of all the property of the said corporation, and of all and every part and parcel of the said incomplete railway, and of everything appertaining thereto or necessary or useful or acquired for the construction thereof, now in the possession of the company, or to which it is entitled as fully and completely to all intents and purposes as the same are now held by the company, and to vest the same in the Government."

J. C.
1880
BOURGOIN
v.
LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

By the 2nd, the company transferred to the Government all its right, title, and interest in and to the balance of the subscription of stock in the said company by the corporation of the city of *Montreal*, and the several subscriptions of stock in the said company of various other corporations, together with all the rights, claims, and demands of the said company upon the said city of *Montreal* for the said balance of subscriptions, and upon the said other corporations for their said subscriptions of stock and bonus.

By the 4th, the Government, in consideration of the above sales and transfers, agreed to pay to certain trustees for the company, upon the confirmation of the deed, the sum of $57,149. 95*c.* currency, being the amount of the then paid-up capital of the company; and also to pay immediately all such disbursements and liabilities as had been adjusted between the Government and the company; and it was further agreed that if any further legitimate liabilities should be established to the satisfaction of the Government to be justly and legally due by the company, the same should also be assumed and paid by the Government.

By the 7th, it was provided that, until it should please the Government to receive possession of the property and premises thereby transferred, the company should hold and administer the same for and on behalf of the Government, and in such manner as should be directed by it, and should in all respects carry out the instructions of the Government in respect of the said railway, and in respect of every matter and thing connected therewith, until the transfer and delivery thereof to the Government and its complete assumption and possession thereof had been perfected; and that so soon as such transfer and delivery should have been so perfected the company should dissolve itself, and should cease to act in any way, the Government thereupon indicating some person to accept transfers of the shares of the company held by the individual shareholders therein.

By the 8th, the company undertook to assist the Government in any manner that might be required, in procuring the passage of any Act by the Dominion or the Provincial Parliament that the Government might deem expedient to have passed in the interest of the enterprise, and to furnish aid and assistance in other matters.

And, by the 9th, it was provided that the deed should have no force or effect after the termination of the next session of the Legislature of the Province of *Quebec*, unless confirmed by the said Legislature at the next session thereof, nor until such confirmation; but that it should be submitted for such confirmation to the next session of the said Legislature, and, immediately upon such confirmation, should have full force and effect according to its terms.

The confirmation required by this last clause of the deed was given by the Act 39 Vict. c. 2, which was passed by the Legislature of *Quebec* on the 24th of December, 1875. That statute not only, by its 8th section, confirmed in the fullest manner the transfer and assignment of the 2nd of November, 1875; it did a great deal more, it combined the enterprise of the *Montreal, Ottawa, and Western Railway Company* with that of another company called the *North Shore Railway Company*, which had made a similar transfer in favour of the Government of *Quebec;* it gave to the railway to be completed the new name of "*The Quebec, Montreal, Ottawa, and Occidental Railway;*" it declared that railway to be a public work belonging to the province of *Quebec*, held to and for the public uses of the province, and provided for the mode of its construction; it vested the construction and management of that railway in certain Commissioners with ample and defined powers; by sect. 11 it made the provisions of the *Quebec Railway Act*, 1869, so far as they were applicable to the undertaking and not inconsistent with the provisions of that Act, applicable to the said railway, and empowered the Commissioners, in cases where proceedings had been commenced by the *Montreal, Ottawa, and Western Railway* for the expropriation and acquisition of lands for the purposes of that railway, and had not been completed, to continue such proceedings under the provisions of the *Quebec Railway Act*, but with the consent of the proprietor of such lands, or to discontinue such proceedings, and commence proceedings *de novo* under the said *Quebec Railway Act;* and by sect. 24 it reunited lands which had been granted to the *Montreal, Ottawa, and Western Railway Company*, to the public lands of the province. Sects. 43, 44, 45, and 46 have even a more direct bearing upon the questions raised by the two appeals now under

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

consideration. Sect. 43, in order "to avoid all doubts," enacts that the *Quebec, Montreal, and Occidental Railway* is thereby invested with all the rights, powers, immunities, franchises, privileges, or assets granted by the Legislature of the Province of *Quebec* to the *Montreal Northern Colonization Railway Company*, and, so far as that Legislature could do, with all the rights, powers, immunities, franchises, privileges, and assets granted by the Parliament of the Dominion of *Canada* to the *Montreal, Ottawa, and Western Railway Company*. Sect. 44 takes away the power of the last-mentioned company to appoint directors, and abolishes the directorate contemplated by the former statutes. Sect. 45 transfers to the Commissioners the rights of the individual shareholders in the *Montreal, Ottawa, and Western Railway Company*, providing that their paid-up stock shall be refunded to them; and, sect. 46 authorizes the Commissioners, with the consent of the Lieutenant Governor in Council, to apply to the Parliament of *Canada* for any legislation which may be deemed necessary for the purposes of the Act.

The combined effect, therefore, of the deed and of this statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company to the *Quebec* Government, and, through it, to a company with a new title and a different organization; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the Appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the company. They insist that, by the general law and by reason of the special legislation which governed it, the company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature; and, further, that the Legislature of *Qnebec* was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a

railway company appears from the judgment of Lord *Cairns* in *Gardner* v. *London, Chatham, and Dover Railway Company* (1). That it is equally repugnant to the law of the province of *Quebec*, so far as that is to be gathered from the *Civil Code*, is shewn by the 369th Article of that Code. But the strongest ground in favour of the Appellants' contention is to be found in the special legislation touching this railway company. The history of the company and of its conversion from a provincial into a federal railway company has been stated in the judgment already delivered. By sect. 1 of the Canadian statute, 36 Vict. c. 82, which effected that conversion, the railway was declared to be a work for the general advantage of *Canada*. By the 5th section of the same statute it was enacted that the continuations of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of *Canada*, and that the company should be deemed to be a company incorporated for the construction and working of such railways and railway, according to the true intent and meaning of the *Railway Act*, 1868 (the Dominion statute). By the 6th section, parts 1 and 2 of the *Railway Act*, 1868 (which comprise all the general and material provisions of that statute), were made applicable to the whole line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of the *Quebec Railway Act*, 1869, should apply to the said railway, or any part thereof, or to the said company. And by the 7th section it was provided that the two Acts of the *Quebec* Legislature (32 Vict. c. 35, and 34 Vict. c. 28), by which the company had been incorporated and previously governed, should be read and construed and have effect as if the changes of expression therein mentioned (the effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of the *Railway Act*, 1868, and that no part of the *Quebec Railway Act*, 1869, should be incorporated with the said special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

(1) Law Rep. 2 Ch. 201, 212.

J. C.
1880
BOURGOIN
v.
LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

These provisions, taken in connection with, and read by the light of those of the Imperial Statute, "the *British North-America Act*, 1867," which are contained in sect. 91, and sub-sect. 10 *c* of sect. 92, establish, to their Lordships' satisfaction, that the transaction between the company and the Government of *Quebec* could not be validated to all intents and purposes by an Act of the provincial Legislature, but that an Act of the Parliament of *Canada* was essential in order to give it full force and effect. This proposition was, finally, hardly disputed by the learned counsel for the Respondent, but they relied upon the 8th clause of the deed, and the 46th section of the *Quebec Act*, as shewing that recourse to the Parliament of *Canada* for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited *The Great Western Railway Company* v. *The Birmingham and Oxford Junction Railway* (1), and what was said by Lord *Cottenham* in that case. It is to be observed, however, that Lord *Cottenham*, when ruling that the contract, which could not be fully carried out without parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the company, in which category the Appellants fell since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully validated by an Act of the Parliament of *Canada*, to obtain which no attempt seems ever to have been made. In their Lordships' opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the Appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed.

This being their Lordships' conclusion, they proceed to consider how it affects the two appeals, and first that which relates to the Attorney-General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to

(1) 2 Phill. 597.

affirm the proposition, that the Attorney-General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring company would fail to make a substantial defence to the action No. 1213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December, 1876, and the defences of the company were filed on the 30th of that month. The transaction between the company and the *Quebec* Government was completed, so far as it was ever completed, in December, 1875. It is, therefore, obvious that, in the first instance, the *Quebec* Government intended to defend the action, in the name of the company, under the provisions of the 7th clause of the deed. All objections which the company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The intervention of the Attorney-General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to shew that the object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the company. Those reasons, the contestation of them, and the other pleadings shew that the new issues raised between the parties were the validity of the transfer as against the Appellants, the right of the Commissioners under the *Quebec Act* to continue or discontinue the proceedings in the expropriation, the abandonment of the railway, and its transformation into a new railway, to be constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the Court of Queen's Bench itself has found, wholly unnecessary for the trial of the original issues. Upon the trial of the action in the Supreme Court, Mr. Justice *Mackay* expressly found "*que les faits allégués dans ladite intervention, savoir le transport des droits et actions de ladite Défenderesse au Gouvernement de la dite Province de Québec, n'a pas été prouvé avoir lieu légalement,*" a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the dismissal of the intervention, even if the learned Judge had taken a view different from that which he did take of the validity of the award.

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

The Attorney-General has failed to shew any grounds for inflicting upon the Appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the Court of Queen's Bench ought to have dismissed the appeal of the Attorney-General, and to have affirmed the judgment of the Superior Court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider appeal No. 144, which arises out of the "*opposition à fin de distraire.*" That opposition to the execution could not succeed as to such of the lands seized as had belonged to the company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the company to the Government of *Quebec*. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice *Johnson*, and on the other of which the judgment of Chief Justice *Dorion*, in part proceeds. Mr. Justice *Johnson* ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice *Dorion* expressed an opinion that it was only at the instance of the Government of *Canada* (the Dominion), or of an individual who could shew that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are somewhat contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of *Canada*, were *ultra vires* of the company and the Government and Legislature of *Quebec*, it was of no legal force or validity against the Appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the company had power, under the second sub-section of the 7th section of the *Railway Act*, 1868, to "alienate, sell,

and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the company must be taken to have sold by it their land to the Government of *Quebec* in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that the contract is not severable in the manner suggested. It is a contract whereby, for the same consideration, everything which it purported to pass was intended to pass. Suppose what was suggested by Chief Justice *Dorion* were really to happen, that the Dominion Government were to take steps to set aside the transaction, could the Government of *Quebec* be heard to say, "True, the transaction will not stand as a transfer of the railway, or of the rights, powers, liabilities, and duties of the company, but it may enure as a sale of the lands acquired in order to the construction of the railway, or part of them, in the exercise of the power in question." Would not the answer be, "There is no trace of such a contract, or of an intention to make it?"

By the evidence taken on this proceeding, it appeared that a considerable part of the lands, rolling stock, and other property seized, had never belonged to the company, but had been purchased by the Commissioners since 1875.

In respect of that property, the Attorney-General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, &c., which had belonged to the company. And in their Lordships' opinion the proper order to be made was one which would have upheld the seizure as to this latter part of the property in question, whilst it granted *main levée* as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz., to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to affirm the judgment of the Court of Queen's Bench in the suit No. 693, wherein the company was Plaintiff, and the Appellants and others were Defendants; to reverse so much

J. C. 1880

BOURGOIN v. LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA, ET OCCIDENTAL.

of the judgment of the Court of Queen's Bench in the action 1213, wherein the Appellants were Plaintiffs, and the company were Defendants, and the Attorney-General intervenor, as relates to the intervention of the Attorney-General, and in lieu thereof to affirm so much of the judgment of the Superior Court in the same suit as relates to such intervention, with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last-mentioned judgment of the Court of Queen's Bench; to reverse the judgment of the Court of Queen's Bench in the matter of the opposition "*à fin de distraire*," and to declare that in lieu thereof an order should have been made reversing the judgment of the Superior Court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the Commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both Courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

Solicitors for Appellants: *Simpson, Hammond, Richards, & Simpson.*

Solicitors for Respondents: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

CHARLES CUSHING . . . . . CLAIMANT;

AND

LOUIS DUPUY . . . . . CONTESTANT.

J. C.*

1880

Feb. 24, 25; *April* 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR QUEBEC, CANADA.

Prerogative of the Crown to admit Appeals—Powers of Dominion and Provincial Legislatures — British North America Act, 1867, *ss.* 91, 92 — *Canadian Act*, 40 *Vict. c.* 41, *s.* 28—"*Final*"—*Whether Delivery necessary to pass Property—Civil Code, Art.* 1472.

6 App Cas 620 Jaffé Coo 103, 113,

The *British North America Act*, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer and did confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as these latter might be affected by a general law relating to those subjects. Consequently the Dominion enactment 40 Vict. c. 41, s. 28, amending the *Canadian Insolvent Act*, and providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i.e.* not subject to the appeal as of right to Her Majesty in Council allowed by the *Civil Procedure Code*, art. 1178, is within the competence of the Canadian Parliament, and does not infringe the exclusive powers given to the Provincial Legislatures by sect. 92 of the Imperial statute. Neither does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.

The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty; but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, *quære*, what powers may be possessed by the Parliament of *Canada* so to do.

Cuvillier v. *Aylwin* (1) reviewed.

Assuming the Canadian law to be (notwithstanding arts. 1472, 1025, and 1027 of the *Canadian Civil Code*) that the property in a thing sold passes by a genuine contract of sale without delivery even as against third persons, *held*, on the evidence in this case, that the *indicia* of a *bonâ fide* sale were

---

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

---

(1) 2 Knapp's P. C. 72.

J. C.
1880
CUSHING
v.
DUPUY.

wanting, and that the circumstance of there having been no change of possession of the thing alleged to have been sold was one of the material facts to shew that the sale was simulated.

APPEAL from a judgment of the Court of Queen's Bench (March 22, 1878), whereby a judgment of the Superior Court (Oct. 5, 1877) was reversed.

The question raised in the proceedings was whether, under the laws relating to bankruptcy and insolvency in the province of *Quebec*, the Appellant was entitled as against the Respondent, the assignee of the estate of the insolvent firm of *McLeod, McNaughten, & Lévéillé*, to certain plant, materials, furniture, and effects formerly belonging to the insolvents, and included within a notarial instrument or bill of sale, dated the 14th of March, 1877, and another deed of the same date, the provisions of both of which are sufficiently set forth in their Lordships' judgment.

The judgment of the Superior Court declared the Appellant to be the proprietor of the articles and things specified in the said deeds, but refused his prayer for immediate possession.

The judgment of the Court of Queen's Bench dismissed the whole of the Appellant's petition with costs, on the grounds (1.) that the deed of sale of the 14th of March, 1877, was a fraud upon the creditors of the insolvent firm, and on that ground void as against the assignee of their estate. (2.) That the deed was in substance and reality not a sale but a pledge, and was void as a pledge by reason of the pledgee (the Appellant) never having taken possession of the articles pledged. (3.) That assuming the deed to be operative as a deed of sale, the title of the Respondent upon his taking possession of the property comprised therein had priority over that of the Appellant, who had never taken possession of the said property.

Thereupon the Appellant moved for leave to appeal to Her Majesty in her Privy Council, and it was ordered that a rule *nisi* be issued for that purpose. The rule was argued, and on the 22nd of June, 1878, was unanimously discharged by the Court, consisting of the same Judges as had heard the appeal, on the ground that by law judgments rendered on appeals to the Court of Queen's Bench in matters of insolvency are final, and that from such judgments no appeal lies to Her Majesty in her Privy Council.

On the 27th of November, 1878, by an order of Her Majesty in Council, the Appellant was allowed to enter and prosecute his appeal, without prejudice to the question of Her Majesty's jurisdiction to admit appeals in cases of insolvency from the Court of Queen's Bench.

Mr. *Kenelm Digby*, for the Respondent, as a preliminary objection to the appeal, contended that the jurisdiction of Her Majesty to entertain it had been taken away by Canadian Statute, 40 Vict. c. 41, s. 28, which amended the *Insolvent Act of* 1875 (38 Vict. c. 16), s. 128, by adding thereto the words, "the judgment of the Court to which under this section the appeal can be made shall be final." Such provision was within the competence of the Dominion Parliament, by virtue of its general legislative authority, and of the special powers relating to bankruptcy and insolvency conferred by *British North America Act*, 1867, s. 91. "Final" may mean (1), final in the Colony, *i.e.* prohibiting an appeal to the Supreme Court; or (2), that the prerogative of the Crown to grant an appeal is taken away; or (3), that the appeal as of right to the Crown is taken away. It was intended to render the judgment referred to final as far as the Legislature could made it final; and therefore the question resolves itself into one of the extent of the legislative authority, whether it could and had taken away the royal prerogative. The authorities cited were, *Cuvillier* v. *Aylwin* (1); *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee* (2); *In re Louis Marois* (3); *Queen* v. *Eduljee Byramjee* (4); *Queen* v. *Stephenson* (5); *Théberge* v. *Laudry* (6); *Johnston* v. *Ministers of St. Andrew's* (7). Assuming that Her Majesty's jurisdiction is not taken away, no case has been made out for granting special leave. [SIR MONTAGUE E. SMITH:—But leave has been granted, and the case is here, and, unless the jurisdiction has been taken away, had better proceed.]

Mr. *Davidson* (of the Canadian Bar) for the Appellant, contended that the appeal lay as of right to the Crown under art.

(1) 2 Knapp, P. C. 72.
(2) 6 Moore, Ind. Ap. Ca. 448, 454, 455.
(3) 15 Moo. P. C. 189.
(4) 5 Moore, 276.
(5) 5 Moore, 296.
(6) 2 App. Cas. 102.
(7) 3 App. Cas. 159.

J. C. 1880 CUSHING v. DUPUY.

1178. Such appeal cannot be taken away by a Dominion enactment; if it could be interfered with at all by Canadian authority it must be by the provincial legislature, which had the exclusive right of dealing with this matter, being one of civil procedure: see *British North America Act*, 1867, sect. 91, sub-sect. 27, and sect. 101. Reference was made to *Meer Reasat Hossein* v. *Hadjee Abdoollah* (1). The word "final" in sect. 28 of the *Dominion Act* (40 Vict. c. 41) does not necessarily mean more than that the judgment was final as regards the Canadian Courts. The power of appeal to the Privy Council is not expressly taken away; while as regards the prerogative of the Crown to grant the special leave which has already been accorded, the section does not purport to interfere therewith. It would require express and precise words to cut down the prerogative, even if the Parliament of *Canada* had power so to do.

Mr. *Digby* replied.

The case was then argued upon its merits, judgment upon the preliminary objection being reserved.

Mr. *Davidson*, for the Appellant, contended that the transaction of the 14th of March, 1877, was sufficient to transfer the property in the subject thereof, and to vest it in the Appellant as against the Respondent. The evidence shews that delivery of possession actually took place. Otherwise the title would nevertheless be complete, having regard to the alteration in the law effected by the *Civil Code*: see arts. 1025, 1027, and 1472, whereby in the case of a sale property passes by the contract without delivery. Reference was made to *Insolvency Act*, 1875, sect. 16, 130; *Canadian Civil Code*, art. 1970: *Toullier*, vol. iv. p. 56: *Carret* v. *Gilbert* (2).

Mr. *Kenelm Digby*, for the Respondent, contended that upon the evidence no delivery of possession of the things comprised in the transaction took place. Under the Canadian Law prior to the Code such delivery was admittedly necessary to pass the title. No question arises as to whether or not the *Civil Code* has altered

(1) Law Rep. 1 Ind. Ap. 72. (2) Sirey, 1864, part ii. p. 183.

the law which required delivery in case of a sale in order to pass the title as against third parties, because the transaction was not a genuine sale at all: see *Pothier, Traité du Contrat de Vente*, Part I. sect. 18; Co. Litt. 205 a. It was an attempt to pledge the property comprised therein, and was inoperative without delivery: see art. 1970 of the *Civil Code*.

Mr. *Davidson* replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal is from a judgment of the Court of Queen's Bench of the Province of *Quebec*, reversing the judgment of a Judge of the Superior Court, which had been given in the Appellant's favour, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of *Canada*, intituled "*An Act respecting Insolvency*" (38 Vict. c. 16).

These proceedings were commenced by a petition of Mr. *Cushing*, the Appellant, to the Superior Court, praying that Mr. *Dupuy*, the official assignee of the estate of the insolvent firm of *McLeod, McNaughten*, and *Lévéillé*, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the Petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused, on the ground that, under the *Insolvency Act*, its judgment was final. The Appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to grant, reserving to the Respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points: first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by art. 1178 of the *Code of Civil Procedure*, from final judgments rendered on appeal by that Court, is taken away by the *Insolvency Act*; and, secondly, if that be so, whether the power of

J. C. 1880 CUSHING v. DUPUY.

the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the *Insolvency Act* enacts as follows:—

"In the Province of *Quebec* all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of the Parliament of *Canada* (40 Vict. c. 41), it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

"The judgment of the Court to which, under this section, the appeal can be made shall be final."

This Court, in the Province of *Quebec*, is the Court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded—(1), the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the *British North America Act*, 1867, which confers and distributes legislative powers. By sect. 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of *Canada*, and by sect. 92 exclusive authority in certain others upon the Provincial Legislatures.

Sect. 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and,

for greater certainty, but not so as to restrict, the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"21. Bankruptcy and Insolvency."

Sect. 92 enacts,—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"13. Property and civil rights.

"14. The administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the Appellant that the provisions of the *Insolvency Act* interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of *Canada* could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislatnre of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property,

J. C. 1880 CUSHING v. DUPUY.

civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of *Canada* would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by art. 1178 of the *Code of Civil Procedure*. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative.

Then it was contended that if the Parliament of *Canada* had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of *Canada*, established by the Dominion Act of the 38 Vict. c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of *Canada* intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (See the *Lower Canada* statute, 34 Geo. 3, c. 30.) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of *Canada* to interfere with the royal prerogative, since the 28th section of the *Insolvency Act* does

not profess to touch it; and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* v. *Aylwin* (1), which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuvillier* v. *Aylwin* (1) arose upon the *Lower Canada Colonial Act* (34 Geo. 3, c. 6), which enacted that the judgment of the Court of Appeal should be final in all cases under the value of £500, and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the Rolls, in his judgment rejecting the petition, are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

In *Re Louis Marois* (2), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, Lord *Chelmsford*, in giving the judgment of this Committee, after stating that in *Cuvillier* v. *Aylwin* (1) the very point was decided against the Petitioner, said:—

"If the question is to be concluded by that decision, this petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the

(1) 2 Knapp's P. C. 72. (2) 15 Moo. P. C. 189.

J. C. 1880

CUSHING v. DUPUY.

proviso contained in the 43rd section of the Act on the prerogative of the Crown."

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier* v. *Aylwin* (1) could be sustained or not, it is obvious that, at the least, they regarded it as being open to review.

In *Johnston* v. *The Minister and Trustees of St. Andrew's Church* (2), upon an application for special leave to appeal against a judgment of the Supreme Court of *Canada*, the effect of the 47th section of the Act establishing that Court, which enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said:—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier* v. *Aylwin* (1), where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case, lately before this Committee, requires consideration, *Théberge and Another* v. *Laudry* (3). It was an application for special leave to appeal against a judgment of the Superior Court of *Quebec* upon an election petition, by which the applicant had been unseated for corrupt practices. By the *Quebec Controverted Elections Act*, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by sect. 90 of the Act it

(1) 2 Knapp's P. C. 72. (2) 3 App. Cas. 159.
(3) 2 App. Cas. 102.

was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject-matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown:—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative."

It was not suggested that an appeal would not have lain to the Queen in Council under the *Insolvency Act* of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned Counsel for the Appellant drew attention to the Act of the Parliament of *Canada* (31 Vict. c. 1), which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-sect. 33 of sect. 7 of that Act is as follows:—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs,

J. C. 1880

CUSHING v. DUPUY.

or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby."

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it.

The order for leave to appeal granted in the present case will consequently stand.

Upon the merits of the appeal the following are the principal facts:—Messrs. *McLeod, McNaughten, & Lévéillé,* who carried on business as brewers in *Montreal,* became insolvent on the 19th of July, 1877, and on the same day their estate and effects including the plant, material, and effects, which are the subject of these proceedings, were seized by the Respondent, as official assignee under a writ of attachment in insolvency. Thereupon the Appellant, who is a notary, demanded from the assignee the delivery of the above-mentioned plant and effects, on the ground that they had been sold to him by the insolvents on the 14th of March, 1877, about four months before the insolvency. He claims them as owner under a contract of sale, in the petition which gives rise to this appeal.

The contract on which the Appellant relies is contained in a notarial instrument, by which the insolvents purport to bargain, sell, and assign to the Appellant the plant, material, furniture, and effects (described in detail in the bill of sale), lying and being in and about their brewery. Some of these effects are valued in the bill of sale, the total of these values amounting to $4800; others are not valued. The consideration is thus stated in the deed:—

"The present bargain and sale is made in manner aforesaid, for

and in consideration of the sum of one dollar currency, cash in hand, paid at the execution hereof, and for other good and valuable consideration heretofore had and received, the receipt whereof is hereby acknowledged, whereof quit, and in further consideration that the said purchaser shall indorse the paper of the firm of *McLeod, McNaughten, & Lévéillé,* which he agrees to do on demand, for a sum which, together with present unsecured indorsements, shall not exceed in all two thousand dollars."

Authority is given to the Appellant by the deed to take possession of the effects.

On the same day a lease was made by the Appellant to the insolvents of the same plant and effects for three years at a yearly rent of $100.

The petition of the Appellant alleges that he took possession of the effects, but in fact no removal or change of possession whatever took place, and the plant and effects remained in the possession of the insolvents, precisely as before, up to the time of their insolvency. All that the Petitioner in his evidence states with regard to possession is, that he went over the effects, and verified their existence.

The general question was raised, and much discussed in the Courts below, whether delivery or *déplacement* of the thing sold was necessary to pass the property in it. It was contended that the Canadian law which required *déplacement* had been altered in this respect by the *Canadian Civil Code,* as the French law had been by the *Code Napoléon.*

Article 1472 of the *Canadian Code* is as follows:—

"Sale is a contract by which one party gives a thing to another for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject, nevertheless, to the provisions contained in Article 1027."

Article 1025 was also referred to.

Article 1027 is as follows:—

"The rules contained in the two last preceding articles apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special

J. C. 1880 CUSHING v. DUPUY.

conditions contained in the Code for the registration of titles to and claims upon such property. But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the things, although his title be posterior in date; provided, however, that his possession be in good faith."

The question was debated in the Courts below whether, under the law established by these articles, *déplacement* or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the Appellant's construction of these articles to the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or *déplacement*, they agree with the opinion of Chief Justice *Dorion* (in which Justices *Cross* and *Tessier* concurred) that the transaction in question was not a genuine but a simulated sale, and, if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (See as to pledge, arts. 1966–1970, *Canadian Civil Code.*)

In examining the character of the transaction, it is in the first place to be observed that the alleged sale was not for a price in money, nor for anything equivalent to money; nor was the consideration fixed and certain, but wholly indeterminate, the amount depending on future contingencies. The considerations expressed in the instrument are, (1) one dollar, which of course is merely a nominal, and not a serious part of the consideration; (2) "other good and valuable consideration heretofore had and received;" the nature and amount being both unexpressed; and (3) what appears to be the real consideration, viz., that the vendee should indorse the paper of the firm, which he agreed to do on demand, for a sum which, together with present unsecured indorsements, should not exceed in all $2000. This agreement of the Appellant to give his indorsements by way of accommodation to the firm is

obviously a consideration of an indeterminate character. Suppose he refused to give them, the remedy would be an action for breach of the agreement, in which the damages would be uncertain. Again, he does not bind himself to pay the bills he may indorse, and the holders might in the first instance choose to sue the firm. The ultimate extent of the liability on the agreement to indorse is plainly uncertain. This vague and contingent liability contains none of the elements of a fixed price, which is one of the essential incidents of the contract of sale. (See *Pothier, Traité du Contrat du Vente,* Part I., sec. 2, art. 2, secs. 1, 2, 3.)

But, however inconsistent the consideration expressed in the bill of sale may be with the idea of a sale, it would be fit and sufficient to support a contract of pledge for securing the Appellant against loss arising from his indorsements of the paper of the firm; and that this, if it were at all real, was the nature and object of the transaction, is shewn by other circumstances attending it. The value of some of the effects (for what reason does not appear) is stated in the deed, and this value alone amounts to $4800. The rest is not valued, but obviously must have been of substantial value. It is scarcely to be supposed that all these effects would have been absolutely sold to the Appellant for a contingent consideration which could not exceed $2000.

Then, on the same day, the whole of the effects are leased to the insolvents for a yearly rent of $100. As the Chief Justice points out, this rent would return the supposed owner of the plant and stock 1½ or 2½ per cent. only upon their value, whilst these implements would come back to him at the end of the term deteriorated by wear and tear. Such a rent he considers to be illusory. Under colour of this lease the insolvents were able to retain the plant and carry on their business as usual.

It is to be observed that a transaction which presents on the face of the documents so anomalous a character has received no extraneous support or explanation. The Appellant gave no evidence of any antecedent consideration, or of the extent of his indorsements of the paper of the firm, or of any circumstances to explain the alleged purchase.

It is scarcely necessary for their Lordships to say that, supposing (as they have assumed) the law to be that the property in the

J. C.
1880
CUSHING
v.
DUPUY.

thing sold passes by a genuine contract of sale without delivery, even as against third persons, yet the circumstance of there being no change of possession must still be one of the material facts to be regarded in determining the question whether any particular sale is real or simulated.

In the present case their Lordships, for the reasons they have stated, agree with the majority of the Judges of the Court of Queen's Bench in their conclusion that, whatever may be the real nature of the transaction in question, it has not the *indicia* of a *bonâ fide* sale.

They will, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

Solicitors for Appellant: *Simpson, Hammond, & Co.*
Solicitors for Respondents: *Freeman & Bothamley.*

[HOUSE OF LORDS.]

H. L. (E.)
1880
May 4.

THE DIRECTORS, &c., METROPOLITAN DISTRICT RAILWAY COMPANY . . } APPELLANTS;

AND

CHARLOTTE SHARPE . . . . . RESPONDENT.

Lands Clauses Act—Special Act—Arbitration—Costs, Action for, before Taxation.

The *Lands Clauses Consolidation Act*, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special Act (38 & 39 Vict. c. ccviii.) declared that the provisions of the general Act were, "except where expressly varied by the special Act," incorporated with it. The general Act provided the forms of proceedings in arbitrations—such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators, and declared that compensation might be recovered with costs. The special Act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special Act. The arbitrator awarded compensation, but said nothing as to costs:—

Held, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs:

Held, also, that the right to costs was entirely independent of the taxation of them, and an action could be maintained for the costs though the amount of such costs had not been previously settled or ascertained by taxation; and consequently an order for the taxation made by the learned Judge on giving his judgment for the Plaintiff, was a valid order.

Holdsworth v. *Wilson* (1) approved.

Per THE LORD CHANCELLOR (Lord *Selborne*):—In construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice and the universal analogy of such provisions in similar Acts of Parliament, ought to have much weight and force.

APPEAL against a decision of the Court of Appeal which (with a variation) had affirmed a finding and order of Mr. Justice *Manisty* (2).

(1) 4 B. & S. 1. (2) 4 Q. B. D. 645.

H. L. (E.) 1880

METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE.

The Respondent was possessed of a house in *Mansion House Street, Hammersmith*, as to which she claimed to be the owner of the lease, and also the occupier. By the *Metropolitan District Railway Act*, 1875 (38 & 39 Vict. c. ccviii.), the present Appellants were empowered to connect their railway with that of the *London and South Western Railway Company*, and, for the purpose of the undertaking, they were, among other things, empowered to lower the level of the roadway in *Mansion House Street* and *Cambridge Road, Hammersmith*. The 2nd section of this Railway Act incorporated the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, "except where expressly varied" by the special Act. The 14th section of this special Act was in these terms: "The company shall compensate the owners and lessees of any houses not purchased by the company abutting upon such portion of *Mansion House Street* and *Cambridge Road* aforesaid, as shall be lowered under the powers of the Act, in respect of the deterioration in value (if any) which may be caused to such houses by reason of such lowerings, and the amount of such compensation (if any) shall be determined, in the event of dispute, by a single arbitrator to be appointed by the Board of Trade on the application of the parties or the company; and all questions of compensation arising out of the interference by the company with the said street and road shall be referred to the same arbitrator; provided that if the company shall think fit to purchase and take any houses in respect of which such claims for compensation shall be made, they shall be at liberty to do so, and the amount of the purchase-money or other compensation shall be determined by such arbitrator as aforesaid."

The Board of Trade appointed an arbitrator who, after hearing the claim for compensation, assessed the amount of compensation due to Mrs. *Sharpe* as rack-rent lessee, but in his award made no mention of costs.

The award was taken up by the Appellants. The solicitor for Mrs. *Sharpe* afterwards delivered to the Appellants' solicitors a bill of costs for £134 11*s.* 1*d.*, subject to the taxation of one of the Taxing Masters of Her Majesty's High Court of Justice, if required by the Appellants.

The Appellants denied that Mrs. *Sharpe* was entitled to make

any claim for costs, and the action was brought to try this question of liability.

The case came on before Mr. Justice *Manisty* without a jury, when it was submitted on behalf of the Appellants that (1.) Under the 14th section of their Act, under which the arbitration had taken place, no liability to costs attached upon them; and that (2.) If any such liability did attach, this action was premature, as no costs had been taxed, and the action could not be maintained for costs before taxation. Mr. Justice *Manisty* held that Mrs. *Sharpe* was entitled to recover her costs, and ordered that the amount should be ascertained by one of the Masters of the Queen's Bench Division. An appeal was entered against this decision; the taxation was suspended until after the decision of the appeal. The case was argued before Lords Justices *Brett*, *Cotton*, and *Thesiger*, who affirmed the learned Judge's decision (1). This appeal was then brought.

Sir *H. S. Giffard*, Q.C., and Mr. *Pollard*, for the Appellants:—

The *Lands Clauses Consolidation Act* does not apply to this case, the proceedings in which are entirely governed by the 14th section of the company's Act. That section makes no mention of costs, and the arbitrator who was appointed under it, and whose powers were conferred, defined, and restricted by the provisions of that section, has not given any costs. The sections in the *Lands Clauses Consolidation Act* which give costs in cases of arbitrations, give them only with reference to cases which are contested and decided under the provisions of that statute. But here was a new procedure created under the 14th section of this special Act, and that section must be treated as having "expressly varied" the enactments of the previous general statute. Where a statute gave a person whose land was taken for a public purpose "compensation for the absolute purchase of the land," but said nothing about the costs of enforcing his claim to that compensation, it was held that the words were not *per se* sufficiently comprehensive to include his expenses and costs: *Re Laws and Her Majesty's Ordnance* (2), and there the distinction was expressly remarked on, between the *Lands Clauses Consolidation Act*, which did mention

(1) 4 Q. B. D. 649.

(2) 1 Ex. 441.

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE.

where costs were to be given, and the special Act then under consideration, where no mention was made of them. [LORD BLACKBURN :—Was not the house here injuriously affected within the meaning of the general Act, which did give costs in such a case?] That was the subject of the arbitration, and here the provisions of the general Act were "expressly varied" by the 14th clause of the special Act, and the variance was one which directly affected the matters of arbitration. The 68th section of the general Act provided for the appointment, by the parties, of arbitrators and an umpire, and, in words, declared that "compensation might be recovered with costs." The 14th clause of the special Act changed all that, abolished, in cases under that Act, all the complicated machinery of the general statute, allowed the parties no power to appoint arbitrators, rendered an umpire unnecessary, and compelled the parties to submit to an arbitrator officially appointed by the Board of Trade. The whole matter of the jurisdiction was therefore altered, and in making this sweeping alteration, of what the section of the general Act had provided, said not one word about costs. It must be taken, therefore, that in simplifying and making less cumbrous and expensive the process of settling the question of compensation, the Legislature had determined that no costs should be given. That was an express varying of the general Act. And it had so been treated in *Weld* v. *The South Western Railway Company* (1) where the mode of raising the capital of a company had been the subject of the variance between the general and the special Act. *The Queen* v. *The Lord Mayor of London* (2) established that such variation may be made between a special Act and the general Act (though incorporated with it) without any express words directly declaring the fact. *Corrigall* v. *The London and Blackwall Railway Company* (3) shews that in cases of this kind where costs are not expressly mentioned they cannot be recovered. *Ex parte Reynal* (4) is to the same effect.

But besides, assuming that costs were recoverable, the Respondent had no right to maintain the action for costs before the costs

(1) 32 Beav. 340.
(2) Law Rep. 2 Q. B. 292.
(3) 2 Dowl. (N.S.) 851; 12 L. J. (C.P.) 209.
(4) 16 L. J. (Q.B.) 304.

which she claimed had been taxed. There could be no right to bring such an action upon a mere claim for costs. The extent of that claim must be ascertained, and taxation was the only recognised mode of ascertaining it. In *Holdsworth* v. *Wilson* (1) the Court of Queen's Bench had distinctly held, even in a case where costs had been, in form, awarded, that no action could be maintained for them before they were taxed, and though on that point the judgment was reversed in the Exchequer Chamber (2) it is clear that in giving judgment in the Exchequer Chamber it was, by mistake, assumed that the agreement of arbitration had been made a rule of Court before the action brought. But that not being so, that error in fact affected the validity of the judgment, and the rule which had been laid down in the Queen's Bench, being in accordance with the fact, is to be preferred. That costs, even though formally awarded in a suit, cannot be recovered without the proper formalities being first observed as to ascertaining and settling them, is shewn by *Ferrers* v. *The Staffordshire Railway Company* (3); and *Gould* v. *The Staffordshire Potteries Company* (4) shews that there must be a formal adjudication before the costs can be recovered. The 32 & 33 Vict. c. 18 (*Lands Clauses Consolidation Act*, 1869), empowers either party to submit the settlement of the costs of an arbitration to a Master, so that that statute assumes the necessity for a settlement of that sort before a legal right to enforce the costs can be recognised. And in *Lord Fitzhardinge* v. *The Gloucester and Berkeley Canal Company* (5) it was held that under that statute the Master was not bound to tax the costs of an arbitration unless the claimant was entitled to them under sect. 34 of the *Lands Clauses Act*, 1845. Even that Act made the award of the arbitrator a condition precedent to the right to costs, and here there has been no award of costs (6). So that *Lewis* v. *Rossiter* (7) did not affect this case, for there the arbitrator expressly awarded costs. But this claimant was clearly not in any way entitled, for

(1) 2 B. & S. 480.
(2) 4 B. & S. 1.
(3) Law Rep. 13 Eq. 524.
(4) 5 Ex. 214.
(5) Law Rep. 7 Q. B. 776.
(6) Sect. 34 enacts that "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrator, shall be borne by the promoters of the undertaking, unless the arbitrator shall award the same or a less sum," &c.
(7) 44 L. J. (Ex.) 136, 33 W.R. 852. W.N. (1875) 121

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE.

the arbitration had not taken place under that statute at all, but under the special Act, which had expressly varied, and thereby superseded, as to this matter the provisions of the general statute. The costs given under the 34th sect. of the general Act are those incurred in "such arbitration," that is an arbitration under that Act, but this arbitration being under a totally different Act, and framed and carried on in a manner totally different from the general Act, the provisions of that Act cannot apply to it.

Mr. *W. G. Harrison*, Q.C., and Mr. *E. G. Man*, for the Respondent, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the first question in this case depends upon the effect of sections 2 and 14 of an Act intituled "*The Metropolitan District Railway Act*, 1875." The former of those two sections, namely the 2nd, is in these words, "The *Lands Clauses Consolidation Acts* and the *Railways Clauses Consolidation Acts* are (except where expressly varied by this Act) incorporated with and form part of this Act." I pause to observe that it is of the greatest importance, in any case like that with which your Lordships have now to deal, to remember the principles of the scheme of legislation contained in those statutes. They were passed because the Legislature thought that a considerable number of general provisions, which had been ascertained, after sufficient experience, to be proper and necessary to be introduced into Acts authorizing undertakings of the character there referred to, had better be enacted once for all in a general form; so that, when any particular undertaking afterwards came to be authorized, the special Act might be introduced in a short form, containing only such clauses as were suggested by the circumstances of the particular case. A general incorporating clause, of which your Lordships have a specimen here, was to supersede the necessity of repeating in every such special Act those provisions which were universally or generally applicable. It appears to me that when this is borne in mind there is no difficulty in applying the provisions of the general Act to the special Act in the case now before your Lordships; and that, if you were to refuse to do so on the grounds

suggested at the Bar, the objects of this whole scheme of legislation might be, in a great degree, frustrated.

The other clause (the 14th) which your Lordships have to construe, deals with the owners and lessees of certain houses abutting upon particular portions of two streets called *Mansion House Street* and *Cambridge Road*. The company had power to lower the levels of the roadways or parts of the roadways of those streets under this special Act. The Legislature foresaw that the exercise of those powers might cause deterioration in the value of the houses abutting upon those parts of the streets or roads; and accordingly, by that clause, it provided that compensation should be made for that deterioration in value, in cases in which the company might not think fit to purchase the houses so affected; or, if the company should think fit to purchase those houses, then, that the purchase-money, to be first properly ascertained, should be paid for them. As to both these alternative heads of claim it is provided, by that clause, that the amount shall be ascertained in a particular manner; namely, by a single arbitrator, to be appointed by the Board of Trade on the application of either party.

That clause is to be read, as far as it can be read, with the general provisions contained in the *Lands Clauses Consolidation Act*. If clause 14 had not been in the special Act, then (as no claim was made which would bring the case within the jurisdiction of justices) any damage sustained by reason of the houses being injuriously affected by the lowering of the roadways would (in the one case) have been ascertained under the 68th section of the *Lands Clauses Act*, and might, at the option of either party, have been ascertained by arbitration. In the other case (that of the company thinking fit to purchase and take the houses themselves) the purchase-money would in like manner have been ascertained, if the parties did not agree about it, under the clauses in the Act beginning with the 21st, relating to cases of purchase-money which might be in dispute; and it might have been ascertained, if the parties or either of them thought fit, by arbitration. In either of those cases, if there was an arbitration, the 34th section would have applied, and the costs would have been payable by the company.

It has been argued that there is a difficulty in applying that

H. L. (E.) 1880 — METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. — Lord Selborne.

34th section to this particular case, because (no other reason has been suggested) the manner of appointing the arbitrator in this case is not that which was contemplated by the 25th section of the *Lands Clauses Act*, and because the 34th section has in it the word "such," saying that, in case of "such arbitration," the costs should be paid by the company. Now, when your Lordships look at the 25th section, you find that the provisions which follow are to take effect "when any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen;" and the word "such" in the 34th section refers to any arbitrations which may fall within that description. What was the question in the case before your Lordships? It was a question of disputed compensation, which by the special Act was required to be settled by arbitration. So far it falls within the exact terms of the 25th section. What difference is made by that which is undoubtedly a variation, the provision that the arbitrator shall be a single arbitrator appointed by the Board of Trade upon the application of either party? Only this, that whereas under the 25th section, if it had not been varied by the special Act, the parties might have agreed upon the appointment of a single arbitrator, or if they did not, there might have been two arbitrators and an umpire; here the Legislature has dispensed with that agreement, and has imposed upon them a single arbitrator, to be nominated, upon the application of either party, by the Board of Trade. With that difference, which is really about as slight a difference as it is possible to imagine, there is not any difficulty whatever in applying those clauses of the general Act, and the 34th section amongst the rest, to this particular case.

12 L.T. 687

Now, my Lords, let us consider what would happen if you did not apply those clauses. If you did not apply the 34th section, there would be in this case an unexplained departure from the universal principle, founded not upon any arbitrary policy but upon natural reason and justice, according to which the Legislature has been accustomed, in Acts belonging to the class of which this is one, to provide that if compulsory powers are exercised against the owners of property for some object considered to

be of sufficient importance to justify it, the costs either shall necessarily be, or at least in the judgment and discretion of some authority trusted by the Legislature may be, paid, so as to indemnify the person against whom those compulsory powers are exercised. And when your Lordships see that this particular section not only deals with a special case of compensation for one particular kind of consequential damage to property, but also, in the alternative, with the compulsory purchase and taking of the property itself, it is inconceivable that the Legislature can have really intended that to be done, in either case, without any provision whatever being made for costs, either by giving costs as a necessary consequence of the arbitration, or by giving the arbitrator, or any one else, power to judge whether they ought to be awarded or not. According to the argument of the Appellants, if the company had chosen to take and purchase compulsorily all the houses abutting upon the portions of these roads which might be lowered, they would have done so without any obligation to pay one shilling of costs to any one of the owners of the property so taken. Of course there can be no question that if the Legislature had not provided for costs in such a case, a Court of Justice could not do so; but in construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force.

My Lords, I think for these reasons that the Court of Appeal was perfectly right in the view which it took of the principal question, and that the costs were payable by the company.

Then there arises the second question, which is of a more technical kind. It is said that under this Act (the *Lands Clauses Act*, 1845), if the procedure had been under it alone, the costs ought to have been "settled" by the arbitrator; or they might, under a subsequent Act, have been "taxed and settled" by a Taxing Master of one of the Divisions of the High Court; and that it was a condition precedent to any action being brought that they should be so settled or taxed. I am not sorry to find that the Court of Exchequer Chamber, in the case of *Holdsworth* v.

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. Lord Selborne.

Wilson (1), has otherwise decided. That decision has since been followed in *Lewis* v. *Rossiter* (2), which was mentioned at the Bar; and it has been considered by the Court of Appeal in the present case to be applicable here. It was suggested at the Bar that the principle of that decision depended upon the fact that there was in that case a submission to arbitration, which (although it had not been actually done) might have been made a rule of Court; and that, where that element did enter into the case, a settlement and taxation of the costs before action brought was absolutely necessary. I was not able to follow the reason for that suggested distinction; and it does not appear to me that the Courts, in the case of *Holdsworth* v. *Wilson* (1) or in the case which followed it, really went upon any such narrow ground.

If the decision arrived at in the case of *Holdsworth* v. *Wilson* (1) cannot be shewn to be inconsistent with legal principles, I do not hesitate to say that it appears to me to be just and convenient—convenient especially in a case like the present, where the right to any costs at all was in controversy between the parties. In that state of things, what, according to the argument of the Appellants, ought to have been done? It is said that the taxation should have been proceeded with *ex parte* before the Master. That, at all events, is not a convenient course. If the Master had been told that his jurisdiction was denied, and that for that reason he would not have the assistance of the party most interested in the taxation, and if he had declined thereupon to proceed, then it is said there ought to have been an application to the Court for a mandamus to compel him to proceed. It was admitted that even if that had been done, and if a mandamus had been granted, and the costs taxed under it, the Respondent might still have been driven to bring an action to recover them. I cannot help thinking that it is a very convenient thing, if the law be so, that all this circuity with its consequent expense should not be necessary—a circuity which, according to the argument, would still have been necessary even if there had been no question between the parties as to the amount claimed for costs, but if the question had been purely one of principle.

It appears to me that the judgment in *Holdsworth* v. *Wilson* (1)

(1) 2 B. & S. 480; 4 B. & S. 1.

(2) 44 L. J. (Ex.) 136,

may be supported upon an intelligible principle. The costs are not created by taxation, nor is the legal right to recover them created by taxation. The right to recover them is given by the statute, the costs have been actually incurred, and in other cases of costs which are subject to taxation it is not generally a condition precedent of a demand, or of an action brought upon a demand for costs, that the costs should have been taxed. "Settlement" or taxation is merely a mode of determining in a quasi-judicial manner, by a ministerial officer of the Court, disputed questions of amount when they arise. The action is founded upon the right; and a demand of that which the party considers himself entitled to has been made. In the action the first question to be determined is, has he the right which he claims or not? If he has, it is possible that there may be no question as to the amount; in that case there will be no need of taxation. But if a question of amount still remains to be determined, the machinery of taxation is convenient; and it is prescribed by the statutes, as subsidiary for the purpose of justice, but not as the foundation of the right. That seems to me to be the principle of the decision in the case of *Holdsworth* v. *Wilson* (1). I think it is one which cannot be shewn to be unsound, although some technical arguments may plausibly be advanced against it; but, it having been so decided, I think your Lordships will do wisely not to dissent from that decision, but to dismiss the present appeal with costs.

LORD HATHERLEY:—

My Lords, I concur in the view suggested by my noble and learned friend on the woolsack on both points.

As regards the first point, I am old enough to remember the form in which these bills for public improvements of various kinds were originally framed. They contained invariably a certain amount of what was called common form, which although in one sense it was common form, yet formed in fact a very operative part of the bill. In a bill of this kind, I do not think I exaggerate in saying that nearly three-fourths of the clauses were of such a character, that they might be made applicable to whole ranges and

(1) 2 B. & S. 480; 4 B. & S. 1.

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. Lord Hatherley.

classes of public enactments for beneficial purposes, undertaken by public companies or bodies, such as gas bills, dock bills, railway bills, and other bills of the same character. Afterwards general Acts were passed containing these common clauses, and since that time special Acts have simply incorporated the general Acts. But such a course could not have been pursued all this time, if a narrow construction were to be put upon the different clauses by which the general Acts are dovetailed into, what I may call, the principal Bill, that is to say, the Bill in agitation at the moment, and you were obliged to spell out every syllable and word of the general Act in order to see how far it would or would not tally or agree with the substance of the principal Act as regards the work which the principal Act was passed to effect. The form here adopted is, so far as my memory serves me, pretty nearly the common form. By sect. 2 of the Act which we have before us the general Acts are incorporated, that is to say, the *Lands Clauses Consolidation Acts* of 1845 and 1860, and the *Railways Clauses Consolidation Acts* also, "except where expressly varied by this Act." When you have to deal with a composite Act of this description, all that can be done is to take up the general Act and read it in. And with reference to clause 2, or analogous clauses which are to be found in everyone of these composite Acts, incorporating the general Act in the particular Act, you have to consider according to the fair construction of the general Act and the words there used, your construction being neither too wide on the one side so as to be too inclusive, nor narrowed on the other side by exclusion, how far the provisions which were thought desirable for the particular Act in question can be made to fit in with the general clauses of the general Act, by taking those general clauses so far as they are not inconsistent with some particular object which the Legislature had in view in passing the special Act, and adopting them.

Now my Lords, what creates such an inconsistency? I quite agree that the words "except where expressly varied by this Act," are not to be relied upon in any narrow spirit of construction. I take it that when the special Act is exceptive it is where it has certain purposes in view which are not contemplated or reached by the general Act, and which could not be carried out con-

sistently with the powers contained in the general Act. When for some special purpose which is before the Legislature at the time, an alteration of the law is required with regard to any particular subject matter, and there is an inconsistency between the clause then under the consideration of the Legislature, and the several general clauses, an exception is made by taking out of the operation of those general clauses the particular thing the Legislature wishes to have accomplished.

It would, perhaps, have been convenient to know why clause 14 was inserted in this Act. I cannot tell whether that would have been desirable or not, because I do not know the facts of the case, but I cannot help thinking that one would have liked to see the special object of the exception in this particular case. Whatever was the cause (we are left to guess at it), it appears to have been thought desirable that there should be some difference between those roads which are specified in the 14th section and the carrying out of the work in other parts of the undertaking where the railway was about to be made; and there was an exception of the particular roads which are here mentioned from the operation of the clauses in the general Act, because it was thought desirable that there should be that special exception. Therefore it was that with regard to the crossing of *Mansion House Street* and *Cambridge Road* there were special enactments made as to the mode in which compensation should be assessed, with reference to the damage done by an operation, which at times creates considerable damage and injury, and which the Legislature thought would not be met duly by sect. 68 of the general Act. Why these two particular roads were taken up, and not a third, the *Clifton Road*, which was to be treated similarly, but was not made the subject of a similar exception, we are left in the dark.

All that is done by way of exception upon this matter is this, that whereas there are certain specified ways of ascertaining value in the general clauses of the *Lands Clauses Act*, these particular roads are subject to a particular enactment in reference to the mode of assessing that value and the trying of the assessment as between the parties; that is to say, the railway directors on the one hand, and the persons from whom they wish to acquire the property, or whose property they wish to be at liberty to

H. L. (E.) 1880

METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE.

Lord Hatherley.

injure, if necessary, in the due execution of their works, on the other hand. The Legislature has provided a mode of ascertaining the compensation in a particular form; that is all I can find in the clause we are now dealing with. How is this value of the property so injured directed to be ascertained? It is by a particular mode of valuation—by arbitration, as distinguished from a proceeding before a jury, or the other recognised modes which there are of ascertaining the value of property, by agreement, entering into contracts, and so on. The Legislature takes it out of that category and says, with regard to this particular property, there shall be a special kind of valuation — a valuation by an arbitrator who shall be appointed by the Board of Trade.

How does that expressly include all the clauses in the general Acts which have reference to arbitration? According to the argument we have heard to-day, it would be necessary when you came to vary the instrument through whose medium the valuation is to be effected, when you changed it from an ordinary magistrate, or from a jury, to an arbitrator, thereupon to take it wholly out of the category of the different provisions incorporated by sect. 2 of the Act, and to deal with it as apart from what is contained in those provisions. My Lords, I cannot read it in that way. It appears to me that all that is done is this: there might have been arbitrators chosen by the parties under the original provision, but that cannot be done when the Act says expressly that the valuation is not to be made in that way. That is an example of what a special exception is. It is not to be done in that way, it is to be done by an arbitrator appointed by the Board of Trade. He must be appointed in that way. When the one arbitrator so appointed proceeds to value, the consents of the two parties may be taken as implied by the Legislature. It amounts to saying, Whilst passing this Act of Parliament, we take it upon ourselves to assume your willingness, or, if you are not wise enough to be willing to do what we consider to be the best for you, then we shall impose upon you the necessity of having the value of this particular property ascertained by arbitration in this particular way. But why are the other provisions wiped out by that? Why are all the other clauses of the Bill wiped out with reference to the

procedure with regard to the valuation of the property? I apprehend, my Lords, that nothing is wiped out, except what would be inconsistent with the appointment of a single arbitrator by the Board of Trade in the manner which is here prescribed.

Then it is said with reference to this matter of costs, you deprive the parties of a remedy which they have in an ordinary case under the 68th section against extremely large costs. You deprive the railway company of the remedy of going before a magistrate, who, if he thinks fit, may go to the extent in some cases of depriving the parties whose property is taken of their costs altogether. If that is so, and if that is inconsistent with the special Act, well and good. But that is not what we are dealing with here. If it is not inconsistent with the Act, it has no application at all, but if there is an inconsistency with the Act upon one point, how does it make it inconsistent with the simplest and one of the most obvious suggestions of common sense and justice, namely, that a person whose property is taken from him unwillingly is to be indemnified from all expense. That is a sort of procedure which one would expect to find prescribed in such an Act, and I can find nothing in the Act which can be said to contradict it.

The second part of the case is one which is no doubt open to a little more question. It has reference, in great measure, to pleading, namely, whether or not any right of action can be maintained until that is definitely settled in respect of which you are about to bring your action. My Lords, I think the observations made in one of the cases cited before us, really have a strong application to that part of the case. If a person is entitled to costs, it is implied that they are to be taxed costs. The principle of taxing costs is well understood, and I do not think that the circumstance that if a reference is made to the Taxing Master, and he is *persona designata*, I do not think that can make any substantial difference in the case. He must proceed on definite and fixed rules, not as investigating the facts with a dubious result in law attached to those facts, but simply as taxing the bill in the ordinary way in which he acts, when any gentleman who wishes to dispute a bill brought against him by his own solicitor, has a right to have it taxed. If it is decided that that gentleman is bound to pay the solicitor's bill of another

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE.

person for some litigation which he has entered into, when that is settled and he is once fixed with the liability to pay the bill incurred by another person, or whatever it may be, you have settled everything requiring to be settled judicially. The rest follows as a matter of course upon definite and fixed principles; and it has been well described by one of the learned Judges in one of the cases that were cited, as a "ministerial" act and not a judicial act which remains to be done. The judicial act was deciding upon the question of principle, and ascertaining whether the gentleman was liable to pay the costs at all. The case of *Holdsworth* v. *Wilson* (1) has been cited upon this point. I am extremely glad to find that there is such an authority, and I am extremely glad to follow it, and I think it carries the case now before the House.

Lord Hatherley.

LORD BLACKBURN:—

My Lords, I am of the same opinion upon both points.

As to the first, it is to be borne in mind what the meaning of the *Lands Clauses Consolidation Act* was, and it cannot be more shortly described than by the preamble to that Act. [His Lordship read it.] I do not think it is possible to express the reason why that Act was passed, and its object, better than the Legislature itself has expressed it in that preamble.

One of the clauses contained in this Act which is to be incorporated with every Act that follows, except so far as it is expressly excepted, and then so far as it is not expressly varied, is clause 68, which applies to lands injuriously affected by an undertaking, as distinct altogether from the lands taken before the work was begun. Clause 68 was to apply to cases where the promoters were found to have done mischief without having previously bought the land. Having done the mischief they were made to pay for it. That 68th section is in the following terms:—[His Lordship read it.] That declares that compensation in certain cases shall be settled by arbitration in the manner therein provided. That is all that provides for the arbitration. Then comes an alternative clause; if it has to go to a jury there are some

(1) 2 B. & S. 480; 4 B. & S. 1.

very stringent provisions which I need not trouble your Lordships by reading now.

This particular Act varies slightly from the *Lands Clauses Consolidation Act*, for, instead of saying in the 2nd section that the provisions of the *Lands Clauses Act* shall be incorporated, "except where expressly varied or excepted," and that they shall be applicable so far as they could be to the undertaking, it says that they "are (except where expressly varied by this Act) incorporated with and form part of this Act." I suppose those who framed the Act knew that they should not except any of them, and therefore thought there was no use in saying "except where expressly excepted by this Act," and they thought that, instead of saying "so far as applicable to the undertaking," it would do to say "except where expressly varied by this Act." As to that, I agree with what has been said; I do not think that because the words used in this Act are "expressly varied" it is essentially necessary that there should be express words saying, This particular section or provision shall not apply. I do not think that express words are required for that purpose, but it does require something that indicates an express intention that they shall not apply as far as applicable to the present case. A mere variation from the ordinary type and form would not be sufficient to prevent the clause applying. A variation shewing that the provision was inapplicable would have the same effect as if it were expressly varied. But I do not think that sect. 68 is altered, deviated from, or varied to such an extent as to make it impossible to apply it, or to make it proper to construe the Act as expressly excluding any application of that section.

The reason of the enactment we are considering seems to have been, as we see from the 13th section, that the railway was intended to be carried over three different streets, with respect to each of which there is a provision that the railway was to be carried over the street by a bridge. In the case of *Mansion House Street*, there is a provision that the clear headway of the road under the railway bridge should not be less than fifteen feet. The street was to be altered so as to be of such an inclination as to allow of that—it was to be a considerable inclination—1 in 24. The level of the street was to be brought down so that the railway

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. Lord Blackburn.

arch, which was necessarily of about the same level as the railway itself, would give a clear headway of not less than fifteen feet. I think it is pretty obvious that the street was to be considerably lowered—how much I cannot tell—we are not told the facts as to that—but it is evident that it would involve a considerable lowering. In the next case, with regard to the crossing of *Cambridge Road*, it was provided that the inclination of that road should not be steeper than 1 in 24 on the north side of the railway, and 1 in 29 on the south side, and the clear headway of the road under the railway bridge was not to be less than sixteen feet. And with regard to the crossing over *Clifton Road* the clause says, "In crossing *Clifton Road* the inclination thereof shall not be steeper than 1 in 34 on the north side of the railway, and 1 in 40 on the south side thereof." There nothing is said about the headway and the height of the archway that was to be above the road. I cannot tell the reasons for this, but I should conjecture from that that the headway over *Clifton Road* was certain to be quite high enough, that it was quite obvious that the arch would be quite high enough, and therefore it was not necessary to make any provision for any particular headway there. With respect to the inclination there provided for, namely, 1 in 34, that is not a steep inclination, and not such as to lead to the conclusion that *Clifton Road* was to be much lowered. But the other two roads would be considerably lowered.

Now, when the roads were lowered as there contemplated, the houses beside the roads must have been affected. I will consider only *Mansion House Street;* as soon as *Mansion House Street* was lowered, and lowered considerably, the houses adjoining that street must necessarily have been affected by that lowering of the road. The extent to which they would be affected, and how far it would be an injurious affecting, would be matters to be determined afterwards, but it was clear that there was a thing to be done which would have that effect, and if sect. 68 had been left untouched as applying to that lowering, every individual person injuriously affected would have had a right to choose whether he would have his compensation ascertained by arbitration (in which case he would appoint one arbitrator, and if the railway company disagreed, and appointed a different arbitrator, there would have

been an umpire, and the Board of Trade would have appointed that umpire), or he would have had the option of sending it to a jury. But sect. 14 does vary that, and varies it very considerably. It is clear that according to that section there is no option left to send it to a jury. The owner of the house cannot do that—it must go to an arbitrator appointed by the Board of Trade; that is settled by the Legislature, the obvious intention being that the Board of Trade should appoint one man, which would greatly diminish the costs of the whole proceeding. So far it is varied very decidedly, but in what other respects it is varied I cannot see. The manner of arbitration is specifically mentioned—the way in which the arbitrator is to be appointed—but what difference does that make in the matter of costs? I do not see that it should make any.

The 68th section has been interpreted to mean—and I think it is plain that it must have meant that—that when the value was to be decided by arbitration, the arbitration as to the costs should be in the same manner as it would be under the previous section 34, the effect of which was that it was to be settled by the arbitration; the costs were to be borne by the promoters, unless they had made an offer, and the sum awarded was less than their offer. Now, what is there in the variation of the 14th section in this *Local Act* from the 68th section in the *Lands Clauses Act* to affect the application of that Act in that respect? Why should we not, taking this Act and the *Lands Clauses Act* as one, and construing them together, take them as meaning this: the value shall be decided by arbitration, which shall be varied from the scheme appointed by the *Lands Clauses Act*, in that the arbitrator shall be appointed by the Board of Trade, instead of there being only an umpire appointed by the Board of Trade in case of dispute between the parties. But all the consequences as to costs shall follow unless the promoters have put themselves in the right by tendering a sum which turns out ultimately to be not less than the amount awarded by the arbitrator? I cannot see why we should not so construe them. Therefore, my Lords, I perfectly agree with your Lordships who have already addressed the House as to the first point, that the company ought to pay these costs, and should be made to pay them.

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. Lord Blackburn.

Then comes the second point, which is much more technical. The scheme of the original *Lands Clauses Act* was that the costs should be settled by the arbitrator: that of course implied that he himself was to inquire into what the costs were, and to say what they were. That was found to be inconvenient. I do not know any cases upon that, but it was found to be very inconvenient indeed, as any one would expect. Then came the second Act, saying that a Master of one of the superior Courts might, upon the application of either party, settle and tax those costs. That being so, in order that it might be known what they were to pay, it would be essential that they should go to the Master. The Master having taxed the costs ascertains that so many pounds are to be paid, and until that is done the railway promoters cannot know exactly how much is to be paid. They would know that they were to pay some costs, but whether they were to pay £100 or £50 they could not know at that time. Then comes the question what is to be done when the promoters deny, as they do deny here, their liability for costs, and say, The Master has no jurisdiction to inquire as to taxing them, we will not go before him at all, we deny the liability altogether. How is that to be decided? It certainly would be very inconvenient if the rule of law stood thus: you are first to go before the Master, and then if the Master pleased he might tax the costs *ex parte*, having of course previously given notice to the promoters; in that case what he had done would be all thrown away if it turned out that they were not liable to pay costs at all. That would be very inconvenient. On the other hand, the Master might say, I have been told that I have no jurisdiction, and I will not tax until I am told that I am wrong. Upon that it might be said, You may go and get a mandamus against the Master compelling him to tax. Upon that the railway promoters might contend that it certainly would be more convenient to do it when the dispute as to the right was decided. They might say, Ascertain the right first, and then when it is ascertained that you have a right to costs, and not till then, go to the Master and tax them.

As to that, although I cannot feel the slightest doubt that that is the more convenient course, I do see considerable difficulty as a matter of pleading in working it out. As the old pleadings

used to be, the jurors were asked to find a debt, and were bound to find the exact debt which the Master upon the old system had said it would be. How can they find that exact debt until the amount has been ascertained by the Master? On the other hand, if it is said they are to find the debt generally and leave the amount to be taxed by the Master afterwards, there is a difficulty about that. There is an analogy with the costs at Common Law —there the jury found 40*s.* costs, but afterwards (I do not know when the practice began) the costs taxed were substituted for the 40*s.* There was in that case an assumption of power to do that; how it originated I do not know; but there would be considerable difficulty in doing it with regard to such legislation as this.

Now, in the case of *Holdsworth* v. *Wilson* (1) that question came before the Court of Queen's Bench, and although I had forgotten it altogether, I see that I was a party to the decision in that case. I see that the Court of Queen's Bench, by a majority of which I was one, thought that it was premature, but I see that Mr. Justice *Crompton*, who was by far the most learned pleader of the four of us, differed in that case, and upon a point of that sort his view was of very great weight. I suppose he was not very strong in his opposition or we should not have ventured to decide it off-hand against him upon a point of pleading. But he does seem to have thought that it could have been done. The case then went to the Exchequer Chamber, and in the Exchequer Chamber it was held unanimously by the Court that the view of Mr. Justice *Crompton* was right, and the other was wrong. It was said by Sir *Hardinge Giffard* that the reasoning of Lord Chief Justice *Erle*, who delivered the judgment in the Exchequer Chamber, was not pointed precisely to the difficulty which had been felt below, and moreover in deciding it he is reported to have made a slight mistake as to the facts, for he seems to have said in his judgment that the award had actually been made a Rule of Court, whereas it was only a potentiality; it might be made a Rule of Court at a future time. No doubt that was so, there was some slight inaccuracy there. Certainly Chief Justice *Erle* when he saw justice and convenience on the other side of the hedge was not a man whom it was easy to keep on the technical side of it.

(1) 2 B. & S. 480; 4 B. & S. 1.

H. L. (E.) 1880 METROPOLITAN DISTRICT RAILWAY CO. v. SHARPE. Lord Blackburn.

But he did not sit alone—there were three of the greatest pleaders of my time sitting with him, namely, Justice *Williams*, Justice *Willes*, and Baron *Channell*; and having regard to that I certainly should pause greatly before adhering to the notion which I entertained in the Court below. If it were *res integra* I do not know how I should get over that difficulty. But it would be very strong indeed to say that that decision was to be reversed now without a great deal of consideration. When one bears in mind that it is certainly the far more convenient course, and that sixteen years have elapsed since that was decided to be the law, and the decision has never been questioned or found fault with, I certainly think that your Lordships ought not to deviate or depart from it now, without some very good reason; and a good reason I cannot see.

Therefore I think that upon the second point as well as the first, the decision of the Court below is quite right, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and the appeal dismissed with costs.

Lords' Journals, May 4th, 1880.

Solicitors for Appellants: *Baxters & Co.*
Solicitor for Respondent: *Thomas Noton.*

[HOUSE OF LORDS.]

THOMAS CLIFFORD AND CAROLINE BROOKE CLIFFORD . . . . . } APPELLANTS; H. L. (I.) 1880 *May* 11, 13.

AND

HEBER KOE . . . . . RESPONDENT.

Gift to A. and Children—Power of Appointment—Wild's Case (6 *Co. Rep.* 17).

The rule in *Wild's Case* (1), even if only a rule of construction, is not now to be departed from.

It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case* (1) applicable, on which the word becomes a word of limitation and not of purchase.

A testator by a will made in 1823 gave "the whole of my landed property situate, &c., to my eldest son *H. W.* and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son *C.* In case of *C.* dying without children or child lawfully begotten, I give the same landed property to my daughter *Harriet* and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right."

H. W. never had a child. *C.* died during the life of his elder brother, but left a daughter. *H. W.* after entering into possession, disentailed the estate, and devised it to his wife's nephew:—

Held, that *H. W.*, by virtue of the rule in *Wild's Case*, took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters.

Seale v. *Barter* (2) approved.

APPEAL against a decision of the Court of Appeal in *Ireland*, which had affirmed a previous decision of the Court of Queen's Bench there (3).

(1) 6 Co. Rep. 17. (2) 2 B. & P. 485.

(3) Ir. Rep. Com. Law Ser. vol. x. p. 179; Law Rep. Ir. Com. Law, vol. i. p. 184.

H. L. (I.) 1880 CLIFFORD v. KOE.

Sir *J. Brooke*, who was seised of certain estates in the county of *Tipperary*, made his will dated in January, 1823, and thereby devised as follows:—"I give and bequeath the whole of my landed property, situated in the county of *Tipperary*, in *Ireland*, after my death, to my eldest son *Henry Warren Brooke* and to his children lawfully begotten, without any reservation or prevarication whatever. In case of his (my eldest son *Henry Warren Brooke*) dying without issue male or female, I give and bequeath the same landed property to my second son *Charles A. Brooke* and to his children lawfully begotten. In case of his (my second son *Charles A. Brooke*) dying without children or child lawfully begotten, I give and devise the same landed property to my daughter *Harriet Louisa* and to her child or children lawfully begotten, and should she have no children she may and shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property to dispose of it by their will and testament to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that I think it is right, as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wish to encourage disobedient children, therefore I leave the power of punishing or rewarding as each of them coming into possession of the property and having children shall think right."

The testator died on the 6th of February, 1841, leaving the three children named in his will him surviving. The eldest son *Henry Brooke Warren* entered into possession of the property. He was married, but never had a child. The second son, *Charles Augustus Warren*, died in January, 1859, during the lifetime of his elder brother, but left a daughter, *Caroline Augusta Brooke*, who had since become the wife of Mr. *Clifford*, and was now one of the Appellants. While Sir *Henry Warren Brooke* was in possession of the estate he executed a disentailing deed, and on the 21st of May, 1855, made a will in which he recited that he had "lately sold and conveyed the estate, subject to the joint lives of

myself and my wife, Dame *Elizabeth Brooke*, and the life of the survivor of us, to my nephew by marriage, *John Heber Pemberton Koe*," and he then gave and bequeathed to his wife all his real and personal estate for life, and appointed her his executrix. He died in December, 1859. His widow entered into possession of the estates. The right of Sir *Henry Warren Brooke* to disentail the estates and absolutely dispose of them being disputed, Mr. *Clifford* and his wife, in May, 1873, brought an action of ejectment against Lady *Brooke* and Mr. *Koe*. The facts were by agreement turned into a special case, on which, in February, 1876, judgment was given for the Defendants. This judgment was afterwards affirmed in the full Court of Appeal. This appeal was then brought.

Mr. *Joshua Williams*, Q.C., Mr. *Madden*, Q.C. (of the Irish Bar), and Mr. *Spencer Butler*, for the Appellants:—

Upon the true construction of this will no power was given to the first taker to put an end to all the estates subsequent to his own, and by a disentailing deed to vest all the property in himself. The eldest son was desired to be favoured, but was not intended to be made absolute master of the property. He had but an estate for life, with a power, a specially framed power, to appoint among his children. He had no child, and therefore on his death the estates went over to the second son. The Court below in holding that he had an estate tail, proceeded on the authority of *Wild's Case* (1), but that case is inapplicable here, for a limited estate was alone vested in him, and the power to dispose of the estate never arose, the intention of the testator plainly being that there should be no power of disposition over the estate, except in favour of the children of the possessor for the time being of the estate. The rule in that case has in many instances been recognised not as a rule of law, but as a rule of construction, and is always subject to the intention of the testator. Here that intention is clear. The testator meant that all the contingencies of children in the cases of the three successive possessors of the estate should be exhausted before the estate was disposed of, except in the way mentioned in the will. The children of each

(1) 6 Co. Rep. 17.

H. L. (I.) 1880 CLIFFORD v. KOE.

possessor in succession were to take on the death of that possessor. If the first had no children the estate went over to the next devisee for life, and after his life estate to his children, and if no one of the three successive possessors had children the last of the three was to have a general power of disposition. That last provision was a strong evidence of what was the intention of the testator. That power, a general power of disposition, was given to the testator's daughter, but it was only to be exercised after it was known that she had no children,—the hopes of children from the eldest and second son and from the daughter being entirely exhausted,—then, but not till then, could the estate be disposed of otherwise than as the testator had marked out. [LORD BLACKBURN:—But the devise to the eldest son contains the word "issue." Do you say that children may mean issue, but that issue must mean children?] That must be the construction in this will. It would be so even with respect to the word "issue" itself alone used. In *Hockley* v. *Mawbey* (1) the gift was to *A.* for life, and after his decease to his son *R.* and his issue lawfully begotten, to be divided among them as *R.* should think fit, and in case he should die without issue, over. Lord *Thurlow* held that *R.* took only an estate for life, and that issue there was to be treated as meaning children, "for he meant they should take distributively." The same was held in *Bradley* v. *Cartwright* (2) and *Eastwood* v. *Avison* (3), in both of which cases the word "issue" was treated as "children;" the first taker took an estate for life only. In *Grieve* v. *Grieve* (4) the contention was that the rule in *Wild's Case* (5) applied, and that an estate tail would have been taken in the house devised to the nieces, but, there being a gift of the furniture to go with the house, it was held that they took only for life, with immediate remainders to the children. Here there is a gift of personalty and the same rule must be applied. The intention of the testator rendered the rule in *Wild's Case* (5) inapplicable. And even in *Seale* v. *Barter* (6) if it had not been for the peculiar form of the codicil, which was treated not as a codicil but as the substantive will, and was construed independently of the original will, devises such as are found

(1) 1 Ves. Jun. 143; 3 Bro. C. C. 82.
(2) Law Rep. 2 C. P. 511.
(3) Law Rep. 4 Ex. 141.
(4) Law Rep. 4 Eq. 180.
(5) 6 Co. Rep. 17.
(6) 2 B. & P. 485.

here would have been held to give only an estate for life. The decision there may therefore be referred to the peculiar circumstances of the devise. So in *Roddy* v. *Fitzgerald* (1) the will itself plainly pointed to the two devisees taking respectively estates tail, for the gift was to each of them, with an immediate and unlimited power of appointment, and the very intention of the testator would have been defeated had they not taken such estates. In the opinions delivered there, and in the judgments, the rule in *Wild's Case* (2) was treated as not universally applicable. And where, as in *Kavanagh* v. *Morland* (3), words of distribution, together with words which carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only. That is so here. In *Morse* v. *Morse* (4) the testator gave a fund to his daughter and her children, and appointed *A. B.* trustee for the daughter and children, and it was held that the money was given in trust for the daughter for her life, and after her decease for her children.

In *Jeffery* v. *Vitre* (5) a bequest to a woman for the benefit of herself and such children as she then had, or thereafter might have, by her then husband, was held to give only an estate for life, with remainder to the children. In *Audsley* v. *Horn* (6) the same rule was applied. The word used in the dispositive part of this will is "children," and in *Byng* v. *Byng* (7) it was held that that word was a word of flexible meaning, and that a gift "for my niece, *M. A. B.*, and her children" (*M. A. B.* was at the date of the will unmarried) must there be held as a word of limitation, so that the after-born son of the niece took an estate tail in the devised property, and Lord *Cranworth* there spoke (8) of the rule in *Wild's Case* (2) being made "to bend to an intention collected from other parts of the will." The primary meaning of the word "children" itself is that it means immediate children; all cases shew that; but whether one word or the other is used, the whole context of the will is to be considered, and the context here shews that the intention was only to grant a life estate to each of the persons specially named in the will.

(1) 6 H. L. C. 823.
(2) 6 Co. Rep. 17.
(3) Kay, 16; 23 L. J. (Ch.) 41.
(4) 2 Sim. 425.
(5) 24 Beav. 296.
(6) 26 Beav. 195; affirmed in 1 De G. F. & J. 226.
(7) 10 H. L. C. 171.
(8) At p. 180.

H. L. (I.) 1880 CLIFFORD v. KOE.

Montgomery v. *Montgomery* (1), *Buffar* v. *Bradford* (2), *Robinson* v. *Robinson* (3), *Heron* v. *Stokes* (4), *Rowland* v. *Morgan* (5), *Doe* v. *Burnsall* (6), *Merest* v. *James* (7), *Broadhurst* v. *Morris* (8), 2 *Jarm.* 366, n., and *Jesson* v. *Wright* (9), were also cited and commented on.

Mr. *Davey*, Q.C., and Mr. *R. J. Robertson* (of the Irish Bar) were for the Respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, this case has been very ably and very zealously argued by both the learned counsel who have addressed your Lordships; but after hearing their arguments, I think your Lordships will have no difficulty in agreeing with the unanimous judgment of the two Courts below, each consisting of four learned Judges, among whom there was no difference of opinion.

The case was considered by them to fall within the rule well known as the rule in *Wild's Case* (10), applicable when there is a gift to parent and children, under which, *primâ facie*, they would take concurrently, there being then no children in existence. It has been said that this is a rule of construction, not of law; but, as a rule of construction, it has been law from the time of Lord *Coke* to the present day; and though the reasons on which it was originally founded may have been sometimes criticised, it has been uniformly followed in cases falling properly within its scope. Your Lordships, I am satisfied, will not think yourselves at liberty to depart, in any such case, from such a rule of construction so long ago established and so constantly followed.

My Lords, it is true, and it is perfectly consistent with *Wild's Case* (10), that the primary sense of the word "children" is issue of the first generation; and this primary sense ought to be adhered to when there is nothing to displace it. But it is displaced by the

(1) 3 J. & Lat. 47; 8 Ir. Eq. Rep. 740.
(2) 2 Atk. 220.
(3) 1 Burr. 38.
(4) 2 Dr. & War. 89.
(5) 2 Phill. 764.
(6) 6 T. R. 30.
(7) 1 Br. & Bi. 484.
(8) 2 B. & Ad. 1.
(9) 2 Bli. 1.
(10) 6 Co. Rep. 17.

rule in *Wild's Case* (1) whenever the circumstances occur in which that rule is applicable; and the word "children" then becomes and is to be construed as, a word of limitation, and not of purchase. The reasons for the rule, even if they were more open to criticism than it is necessary at present to assume, are admitted to be such as would apply in the case before your Lordships, unless the power which follows the principal words of disposition, is sufficient to exclude them. There can be no doubt that, if upon the face of this will you found a context excluding the operation of the rule, it would be excluded; but if, in the whole dispositive portion of the will you have nothing more than what the rule itself assumes, nothing which does not fall strictly within the terms of the rule, then I apprehend you must, *primâ facie*, construe that dispositive part of the will according to the rule, and the burden lies upon those who deny its application to shew that elsewhere in the will something is found inconsistent with it.

Approaching in this manner the terms of this particular will, it seems to me, and I think it will appear to your Lordships, to be clear beyond reasonable controversy that the rule would apply if there were not the power, on which, in the argument, the principal reliance has been placed. The will begins with words which, I agree, are sufficient to carry the fee, although they are connected with terms of local description. But to whom, my Lords, would they carry the fee? To *Henry Warren* and his children lawfully begotten. According to the rule in *Wild's Case* (1), if there had been children then in existence capable of taking at once concurrently with their parent, then under those terms a fee simple would have been taken by the parent and the children concurrently, as joint tenants; but if there were not children in existence who could take concurrently with the parent, then the fee is taken by the parent, and by the children in succession after him, as tenants in tail; the parent taking a fee tail in the first instance and transmitting it according to the law of descent to all his issue until they are exhausted. Therefore, if it rested solely upon those first words, there could have been no doubt of the application both of the rule and of the reasons for the rule; for in this case there were no children.

(1) 6 Co. Rep. 17.

H. L. (I.)
1880
CLIFFORD
v.
KOE.
Lord Selborne, L.C.

Well, the will goes on: "In case of his, my eldest son, *Henry Warren*, dying without issue male or female," then there is a gift over. I pause there to say that, unless you start with a construction of the word "children" inconsistent with the rule in *Wild's Case* (1), these words which follow, instead of repelling, fortify the application of that rule; because the words "dying without issue male or female" are properly coincident with the duration of an estate tail; for though it is true that, if a particular description of issue had been previously mentioned who would take the fee, those words might mean dying without such issue, yet, on the other hand, they signify a total failure of issue of all generations in their primary and natural sense.

Then, what is the gift over? The same "landed property," again carrying the fee, is given, not to the children of *Charles*, but to *Charles* and his children lawfully begotten, precisely in the same manner. And then, if *Charles* should die "without children or child lawfully begotten," there is a gift over to "*Harriet Louisa* and to her child or children lawfully begotten," again of the same landed property, again carrying the fee in exactly the same manner. All that is perfectly intelligible and capable of operation in the ordinary course of settlement, so as to carry the inheritance in a succession of estates tail through all these lines, subject to the legal incidents of an estate tail; not *Henry*, nor *Charles*, nor *Harriet*, having then had children. Your Lordships will not, I think, in this case depart from the principle that a Court of justice ought not to refuse to give their proper interpretation to words which create a series of estates tail, merely because the law says that the taker of an estate tail may bar it, so as to prevent the succession from going farther than himself. The words which follow, "and should she have no children she may and shall have a power of bequeathing it to whomsoever she pleases," deal with the ultimate remainder, giving an absolute power of testamentary disposition to the person who, in that case, would be the last tenant in tail. All this is consistent with the rule. There is not a single word, so far, which points to anything that would not fall within the rule; and in truth, when you have regard to the fact that the words which here carry the fee

(1) 6 Co. Rep. 17.

are, in no part of that series of limitations, more connected with the gift to the issue than they are with the gift to the parent, I apprehend that the rule is applicable in this case more easily, and with greater conformity to the apparent intention of the testator, than in some of the cases to which it has been applied.

Now, my Lords, I will ask your Lordships to compare with that construction, resulting from the rule, the consequences which would follow (even before we come to consider the power) from the construction insisted upon by the Appellants. The Appellants require you arbitrarily to sever the application of the words which pass the fee, and which, on the face of the will, are, in each of the steps of this series of limitations, equally applicable to the parent and to the children; you are arbitrarily to sever these words from the parent, to deprive them of all their force as to him, and to give them force only by way of remainder to the children. That is the first step. It was sought to be justified by some authorities relating to gifts of personal estate only. In such cases there is an obvious reason why, on similar words, you might arrive at such a construction, namely, that it is the only way by which the children can take anything. But here the children may take, *per formam doni*, as heirs in tail; they are provided for without departing from the established construction of the words, which words give the same estate of inheritance to the parent as to the child.

The next consequence which would follow from the Appellant's argument is this; that having arrived at that point, having reduced the parents to tenants for life, and having given the fee to the children, the children would take that fee as joint tenants; so that, if there should have been no severance, an eldest son, dying in his father's lifetime, would (as far as this disposition goes), be entirely excluded, although he might leave issue, which issue might last for many generations. When we come to the power and the reasons for it, we find that, according to the same construction, nothing could be appointed to a grandchild, even though he might be the baronet (a dignity in the family, of which the testator takes notice), and the head of the family. These, my Lords, are certainly not reasons for departing, in this instance, from the rule in *Wild's Case* (1). It may be convenient in this

(1) 6 Co. Rep. 17.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Selborne, L.C.

place to take notice of the argument which was founded upon some passages in the opinions delivered in this House in *Roddy* v. *Fitzgerald* (1) and in *Kavanagh* v. *Morland* (2) the case before Vice-Chancellor *Wood*, which is there referred to. In the opinion given by Mr. Justice *Vaughan Williams* (3), this is said: "I do not propose to controvert the general proposition laid down in Mr. *Jarman's* Treatise on Wills, and supported by the opinion expressed by Vice-Chancellor *Wood* in *Kavanagh* v. *Morland* (2), namely, that "where words of distribution, together with words that carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only.'" The same doctrine, almost in the same words, is repeated in the judgment of Lord *Cranworth* (4); and in that of Lord *Wensleydale* (5) it is a little expanded. Lord *Wensleydale* says, "I agree with the opinion so clearly expressed by Mr. Justice *Williams* upon this point; and I think, with him, that it is quite unnecessary to question the opinion of Vice-Chancellor *Wood* in *Kavanagh* v. *Morland* (2), and the opinion expressed in Mr. *Jarman's* work on Wills, that when words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only, and that, whether the fee be given by the technical word 'heirs,' or by the word 'estate,' occurring in the description of the subject of the gift, and whether the gift to issue be direct, or by implication from the power to appoint to them, and whether there is a gift over on a general failure of issue of the ancestor or not."

My Lords, it was argued that because the word "property" here would carry the fee, and for a reason connected with the power, which I shall come to observe upon afterwards, the principle so laid down in *Kavanagh* v. *Morland* (2) and in *Jarman's* work on Wills, was applicable here. But the answer to that is, that there are here no words of distribution, but on the contrary, the issue, if they took as purchasers, would take as joint tenants and not as tenants in common; and there are here no words which would carry an estate in fee, "attached to the gift to the

(1) 6 H. L. C. 823.
(2) Kay, 16; 23 L. J. (Ch.) 41.
(3) 6 H. L. C. at p. 862.
(4) Ibid. at pp. 871–874.
(5) Ibid. at p. 883.

18 Jan 1867

issue." The words which would carry an estate in fee are attached to the gift to the parent and the children indiscriminately. Therefore both these elements are entirely absent in this portion of the will, and I think it will presently be seen that neither of them can be inferred from that which follows, namely, the power of appointment.

Now, with regard to that power: the testator having so disposed of (and according to the rule in *Wild's Case* (1) and even according to the arguments of the Appellants at the Bar, having made a complete disposition of) the whole fee simple of his estate, because by *Wild's Case* (1) it is carried through a series of estates tail, followed by a power over the reversion in fee simple, and according to the argument at the Bar it is carried through a succession of life estates, followed in each case by estates in fee simple,—this power which follows is manifestly not necessary, and cannot be assumed to be given to supply a gap or deficiency in that series of limitations. My Lords, it appears to me, that it is a power and nothing more; a power, in default of the execution of which, your Lordships cannot imply any gift to the objects of the power; because those gifts have been previously made in the dispositive part of the will by the testator himself, who has exhausted everything, unless the power is so exercised as to displace any of the dispositions he has made, either partially or wholly.

Well, then, what is the power? "I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them my own children shall seem meet and right and proper." He adds a reason which I will presently refer to.

Two arguments have been founded upon that power—one broadly and generally, that the fact of there being such an indication of succession in the will excludes the reason for the rule in *Wild's Case* (1); the other that the word "children" is in that part of the will used in its primary sense, and must, therefore, exclude in the earlier dispositive part the larger sense, equivalent to "issue," which the rule in *Wild's Case* (1) would impose upon it.

(1) 6 Co. Rep. 17.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Selborne, L.C.

The first of those two arguments is inconsistent with the principle of *Wild's Case* (1) itself, and also with the decisions which have followed upon it. In *Wild's Case* (1) the very point which the rule settles is that there is succession, not that there is no succession of interests: that in a case where children are not in existence so as to take concurrently with their parent, the gift is a gift of estates tail in which the children can take and will take only by way of succession to their parent. A power, therefore, which contemplates that very state of things, which contemplates that the parent will remain in possession until his death, and that any control over the succession which is given to him may be exercised by his will, is not only not repugnant to the rule in *Wild's Case* (1), but is most plainly consistent with it.

With regard to the authorities, the case of *Seale* v. *Barter* (2) is a direct and positive authority to the effect, that in a will, for this purpose precisely like the present, where the word was "children," and where the construction would otherwise have depended upon the rule in *Wild's Case* (1), that rule was not excluded by a power of the same nature and character.

And, my Lords, I think it is clear that the reason why the cases of *Jesson* v. *Wright* (3) and *Roddy* v. *Fitzgerald* (4) were referred to in the Court below was, that in both those cases, which in their other circumstances were infinitely stronger in favour of a mere estate for life being taken by the parent, it was held that a power of distribution among children or issue, whether co-extensive or not co-extensive with the persons who might take under the estate tail, did not prevent the first taker, who was also the donee of the power, from taking an estate tail. Your Lordships will remember that, both in *Roddy* v. *Fitzgerald* and in *Jesson* v. *Wright*, the scheme of the will was this: an estate was given to the parent, expressly and in terms, for life, with a power to him to appoint among his issue or "heirs of his body," and with remainder in default of appointment to "issue" in the one case, and to "heirs of the body" in the other; so that, as far as the intention apparent from the natural sense of the testator's words went, you had, in both those cases, circumstances in favour of giving the

(1) 6 Co. Rep. 17.
(2) 2 B. & P. 485.
(3) 2 Bli. 1.
(4) 6 H. L. C. 823.

parent an estate for life only, infinitely stronger than any you have here. The first and the larger argument, that the mere existence of such a power as this is inconsistent with the application of the rule in *Wild's Case* (1), is therefore clearly displaced.

The other argument was, I must say, urged with great force and ingenuity, and it made more impression on me than anything else which was said by the learned counsel for the Appellants. It was insisted that the word "children" occurring here, placed a limited sense upon that expression wherever occurring in the will, on the ground that you ought, if possible, to give to the same word in a will the same sense throughout. Well, my Lords, that, like many other such canons of construction expressed in general terms, is very far from universal, and will always require a good deal of care in the application of it to particular wills. In this very sentence I cannot at all accede to the view that because, when the testator speaks of "his own children," the donees of the power, he certainly means his sons and daughters, he must necessarily mean sons and daughters only by the same word when used to describe the objects of the power. I see no necessity for any such conclusion; for the larger includes the narrower sense. I do not, therefore, feel compelled to inquire whether the application of the rule in *Wild's Case* (1) to the dispositive words of this will, would have been displaced by any inference from this power, if the power itself had been clearly and unequivocally confined to children of the first generation; because I cannot, without reasoning in a circle, restrict the objects of the power, described as "one or each of their children," to children of the first generation, if, in the earlier part of the will, the same word ought otherwise to have been understood as a word of limitation extending to remoter issue. My view is, that your Lordships should first endeavour to ascertain what is the proper construction of the dispositive words of the will, and not overrule that construction by anything which follows, which does not necessarily require a different interpretation. The later clause may as properly receive light from the earlier, as the earlier from the later. I therefore should have been inclined to think, apart from authority, that it was by no means to be assumed that the word "children" here, as descriptive of the objects of the power,

(1) 6 Co. Rep. 17.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Selborne, L.C.

might not extend to all persons who according to the true interpretation of the dispositive part of the will (if it stood alone) would have come within the description of children. And it seems to me that the case of *Seale* v. *Barter* (1) is not distinguishable from the present on any satisfactory grounds as to that point. True it is, that there the power was for the testator's son, "to settle the same or any part or parts thereof by will or otherwise on them or any of them as he shall think proper." But to whom did the word "them" refer? The previous words were, "My son, *John Seale*, and his children lawfully to be begotten." Surely, my Lords, there is no difference between "them," as applied to that antecedent, and the words "his children lawfully to be begotten" if they had been there repeated; and if that is a correct observation upon *Seale* v. *Barter*, we have no difference really here, except that what was there expressed by reference is here expressed by repetition. I think, my Lords, that is not a sufficient distinction.

I am confirmed in that view by what follows in this will; because the testator, having introduced this power to vary the effect of the previous disposition of the will, says, "My reason for this is that I think it right, as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wish to encourage disobedient children, therefore I leave this power of punishing or rewarding, as each of them coming into possession of the property and having children, shall deem right." My Lords, that view of the testator's wish and opinion, that it is desirable that the eldest son, succeeding to the title of baronet, should on that account possess something more than the others, goes far to repel the notion that he could possibly intend to make a disposition by which, if the eldest son of any donee of the power should die in his father's lifetime, leaving a son who would immediately on his death succeed to that title, that grandson, being the baronet, should be absolutely and necessarily excluded from all interest in this estate, unless his father should, before his death have severed his share, which (according to the interpretation of the Appellants) might be a very small share, and at all events not more than that of every one of his brothers and sisters, from the rest. Not only would the testator have given the

(1) 2 B. & P. 485.

grandson nothing in that case, but the testator would have given no power to the grandfather to give anything to the grandson, so becoming the head of the family, and succeeding to the title of baronet.

The plain meaning of the testator seems to me to be this: First of all I think it right that the eldest son who will be the baronet should have more than the others, and I have myself made a disposition under which, if it is not disturbed by any exercise of the power, he will take the whole estate. But I also think it right that his parent should have some kind of control, and should be able to reward or punish obedience or disobedience, and also (though this, perhaps, is not expressed quite so clearly), that he should be able to make some provision for younger children. I, therefore, allow him to modify my own disposition under which the whole would go to the head of the family; I allow him, if he pleases, to give some part of the estate to the others; and I also allow him, if he pleases, to disinherit the future head of the family in case of his misconduct or disobedience. For these reasons, my Lords, it appears to me not only that he had no intention inconsistent with the application of the rule in *Wild's Case* (1), but that, in some events which might happen, he has expressed a purpose which the application of that rule would rather facilitate than otherwise.

My Lords, I do not think it necessary to detain your Lordships by any observations upon the other cases which were urged at the Bar as having some bearing upon the present, farther than to say with regard to one of them, *Eastwood* v. *Avison* (2), that it appears to me to turn entirely upon the very different words of the particular will there under construction; and, with regard to the case before Vice-Chancellor *Malins* (3), that, if it really did turn upon the mere fact that by the same words real estate was given and certain articles of furniture annexed to it as heirlooms, I should hesitate long before I came to the conclusion, that the real estate ought not to go in the manner which rules of construction properly applicable to real estate would have determined, only because, according to that construction, those heirlooms would have vested

(1) 6 Co. Rep. 17. (2) Law Rep. 4 Ex. 141.
(3) *Grieve* v. *Grieve*, Law Rep. 4 Eq. 180.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Selborne, L.C.

absolutely in the first tenant in tail. But it is quite unnecessary to consider that; that case is not before your Lordships; if it were, it is very possible that it might be found to contain other grounds for the decision, sufficient to distinguish it altogether from the case now under consideration.

I will not detain your Lordships by any farther observations. I propose that you should affirm the judgment of the Court below and dismiss this appeal with costs.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion, and I have so very often, at different periods of my judicial career, had to consider this class of cases, that I do not think it is necessary to enter into detail on the present occasion, more especially having regard to the very full and exhaustive opinion to which we have just now listened.

I apprehend my Lords, that a Court of Justice in endeavouring to ascertain the intention of a testator in a will which may admit, when brought into contact with the surrounding facts, of some doubt and difficulty, will always do two things. In the first place it will do what is somewhat quaintly called place itself in the testator's arm-chair, that is to say, it will see what was the existing state of the family and of everything connected with the property which may have a bearing upon the subject, and then consider the words of the bequest. And in the second place it will consider whether or not those are such words as have a fixed and determined intent imputed to them whensoever they occur in a will, unless some contrary argument can be derived from the construction of the will and the circumstances connected with the property and the position of the family.

Now, my Lords, it has been settled for about 300 years that if, on reading a will you find these words: "I give to *A.* and his children my estate and property," and so on, then *primâ facie*, if you make no inquiry at all about the state of the family of the donee and the devisee, and assume that there was a family in existence at the date of the will, those words in themselves mean a gift to the parent and the children as either joint tenants or tenants in common, as the case may be, according to the construc-

tion of the other words of the will. But if you find on inquiring into the state of the family that there was no child whatever of *A.* in existence at the time of the will being made, then in order that the children who may come into existence (their parents being alive) may have some share of the interest which was evidently intended in some way or other to reach them, you, in such a case, according to the rule which has been established for 300 years, interpret the words as being a limitation to the parent for life with remainder to the children successively, so that each of them shall have his chance in his turn of taking the property. The words the testator has used here in that part of the will in which he gives a power to the children are these: "I do hereby give and leave a full discretionary power *to each of my children arriving at the possession of this landed property.*" In fact everything in this will, as far as I can see, tends to shew that the construction which was established by the rule laid down in *Wild's Case* (1) is the construction which will alone give full effect to this testator's intentions. I should doubt very much whether we could do as is said to have been done in one case which was referred to, namely, construe the will by anything as the consequences which might be suggested as being derived from the particular construction. I apprehend when a rule of construction of this kind has been established for the long period for which this has been established, we must take the meaning of the bequest as arrived at by that rule of construction, and we must not alter that rule which has been so settled, upon any slight considerations, or any suggestions that may be made with reference to possible consequences.

With regard to this case, it has been endeavoured to be argued, as in some previous cases, particularly in the case of *Seale* v. *Barter* (2), that you are not to construe this will under the particular circumstances of this case by the rule which was laid down in *Wild's Case* (1), because it is suggested that it is improbable (no one ventures to say that it is impossible so to construe it) that the testator should give to the devisee a full and complete ownership in the shape of an estate tail, which might be made an estate in fee, by the executing of a proper deed for the purpose of

(1) 6 Co. Rep. 17. (2) 2 B. & P. 485.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Hatherley.

barring the entail, and should, at the same time, give him a power of distribution, which he could exercise by testamentary disposition as soon as he was once in possession of the property.

Now, in the first place, my Lords, it is scarcely correct to say that a testator has at all times before him all the consequences which may arise from his making a particular disposition of his property. It is one thing to say that he must be taken to know the law, and when he contemplates what he is doing, he must be taken to know the effect of all the different provisions he is making, but it is quite another thing to say that he must have present to his mind the subsequent effects, not connected with his own gift of the property, but connected with the different dispositions of it which he authorizes to be made.

But there is another reason why the testator might well give a disposing power, and yet at the same time create an estate tail. Those who take estates by will naturally pay some regard to the intention as exhibited on the face of the will by their testator; and it might well be that a testator would say: I make this provision because I think this, *rebus sic stantibus*, to be the best disposition I can make of my property: but then there are two or three circumstances to be considered; there is a baronetcy in the family; it is desirable that the baronet should be placed in a better position than the rest; I have not done that; I leave it to those who come successively into the possession of the property to do what they think right in that respect; I delegate to them certain powers which they may think it right and necessary after my decease to exercise, in order that they may more completely fulfil that which I wish them to consider their duty, namely, to carry into effect all my intentions as far as I can at present judge of them, and at the same time to retain in their hands a certain power derived from me, which they will not be offending me in my grave by exercising; and for that purpose I give them the power of disposing of the property as they think best, either for the purpose of maintaining the position of the baronetcy in the family, or for the purpose of rewarding or punishing obedient or disobedient children, as the case may be. They are to execute the provisions I have made, or they may proceed, by the exercise of the power, to modify the interests I have created in order to meet

the two objects I specially have in view, and to which I have drawn their attention, namely, dealing with the baronetcy in the manner I have described, if they think proper, when they come into possession of the property some years hence, and also rewarding or punishing any obedient or disobedient children in the way they may think fit. I do not see in the least how it could have been supposed that the giving of this power over the estate should render it impossible, on the ground of inconsistency, to attach the proper sense to the words used by the testator, which bring the case within the rule in *Wild's Case* (1), namely, the gift to the parent and the children. I see in that no reason for departing from the rule.

The other cases which were cited have been thoroughly sifted by my noble and learned friend on the woolsack, and I need not enter into them now. One of those decisions cited was, it seems, a decision which I gave twenty-five years ago (2). It was a well-considered decision at the time, and I have found nothing in what has taken place since, and I have heard nothing in the argument on this occasion, to satisfy me that I there departed from the long-settled rule which I certainly intended to follow, which says that a gift to *A.* and his children when he had none, creates an estate tail in the parent; and as to the estate tail I should observe that it would carry the object into effect by the subsequent limitations to the children.

Therefore, I entirely agree with the motion which has been proposed by my noble and learned friend on the woolsack, that the decision of the Court below should be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN :—

My Lords, I am entirely of the same opinion. The subject of the construction of wills did not so often come before the Courts of Common Law, in which I practised, as before the Courts of Equity, and therefore if there had been anything which required a careful consideration of the cases which existed on this point, I should have been afraid to decide without looking at them more than I have done. But my noble and learned friends who have

(1) 6 Co. Rep. 17. (2) *Kavanagh* v. *Morland*, Kay, 16; 23 L. J. (Ch.) 41.

18 June 1267.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Blackburn.

spoken before me, who are both well acquainted with those cases, say that there are not cases (and I think if there had been any Mr. *Williams* would have cited them) which bear against the decision under appeal, and the general principles of the cases one well knows. That being so, I have no doubt that the decision of the Court below was right, and should be affirmed. I will only meet those arguments that were used against it which struck me as the best.

In the first place it must be remembered that when *Wild's Case* (1) was decided, and indeed for a long time after that, it was the law that the heir-at-law of a testator should not be disinherited without express words, or without something which indicated an express intention. That was very contrary to the general intention of testators. For a long while the Courts were obliged to say, If there is nothing to shew distinctly that the heir-at-law of the testator is disinherited, he is not to be disinherited farther than is necessary; if a testator gives *Blackacre* to *A.*, and does not use words of inheritance, the heir-at-law must take it after *A.'s* death; it is to be a gift only for his life. But, then, in more modern times the Courts caught at, and sought for, things which would enable them to give effect to what no doubt the testator generally intended. If he said, I give my "estate of *Blackacre*" to *A.* and so on, that did disinherit the heir-at-law, because it was said that "estate" meant the whole inheritance, and consequently the heir-at-law was disinherited by such a word. But (and that is what I now wish to point to) at the time when *Wild's Case* (1) was decided no such idea of catching at words shewing that, contrary to the rule of law, an intention existed to disinherit the heir-at-law, was thought of. It is very true that if, according to *Wild's Case* (1), there had been a devise of *Blackacre*, or the lands of *Blackacre*, to *A.* and his children, if they took as tenants in common, according to the first alternative, if children were alive, they would have taken their several estates for life, and for life only, and the heir-at-law of the testator would not have been disinherited. If, on the other hand, exactly the same words had been used leaving *Blackacre* to *A.* and his children, when there were no children alive, then, according to the rule of construction

(1) 6 Co. Rep. 17.

laid down in *Wild's Case* (1), that would give an estate tail, which would be an estate of inheritance, and would *pro tanto* disinherit the heir-at-law, much more than the other would have done. The heir-at-law would still, I apprehend, have taken a reversion after the estate tail, but that would have been of comparatively little good to him.

On that Mr. *Williams* argued thus, as I understood him; he said, that being so, the rule in *Wild's Case* (1) applies whenever it is merely "the lands of *Blackacre*," or, as I put it, merely "*Blackacre*" (without any more words) that is given, because that has the effect of disinheriting the heir-at-law (because you then make it an estate tail) and that has a merit in it; therefore you would apply the rule in *Wild's Case*. But *aliter* if the testator had said "the estate of *Blackacre*," because there it is no longer necessary to have an estate tail for the purpose of disinheriting the heir-at-law. But, my Lords, I apprehend at the time of Lord *Coke*, and long afterwards, so far from that being a merit, or being an argument in favour of a construction of a will, it would have been considered a very strong reason for construing the will the other way. It would have been said (I have no doubt Lord *Coke* would have said that, if it had been put to him); although by holding that, we must disinherit the heir-at-law, still, we must do that, though that is a great objection. It certainly never would have entered into Lord *Coke's* mind to say, I think we must make it an estate tail because it will have the effect of disinheriting the heir.

That being so, I think Mr. *Williams'* argument was, that inasmuch as here the word "property" is used (I will assume for the moment that the word "property" is equivalent to "inheritance") inasmuch as by his will the testator left an inheritance in his lands to his son *Henry*, and his children, it was not necessary in order to make that an estate of inheritance to give an estate tail; therefore it was not required to construe "children" as a word of limitation amounting to "I give an estate tail," but if it had been, "I leave my lands," it would. I see no authority for that—none was cited, and I think *Seale* v. *Barter* (2) is very much against it, for though, in that case, there was the word "estate" brought in

(1) 6 Co. Rep. 17. (2) 2 B. & P. 485.

H. L. (I.) 1880 CLIFFORD v. KOE. Lord Blackburn.

(very much as "property" is here) in a way that might be said to give an estate of inheritance, I do not see anything to lead me to suppose that that was acted upon. Therefore I think this must be taken as coming within the rule of *Wild's Case* (1), and it would be just the same, if, instead of the word "property" being used, the word "estate" had been used. The construction of the will would be exactly the same, as far as this point goes, whether you say, "I leave an estate of inheritance in *Blackacre* to *A.* and his children," or whether you merely say "I leave *Blackacre* to *A.* and his children." Of course it is immaterial now, when a will has been made since the passing of the *Wills Act* in 1837; it is only in construing an old will that this question would arise at all. However, I think that is no reason for construing the word "children" in the sense of words of limitation.

I quite agree, my Lords, that there may be, in another part of the will, enough to shew that this word "children," which *primâ facie* means sons and daughters, when contained in such a gift as that giving lands to *A.* and his children, he having no children existing at the time the bequest was made, although by this rule of construction, which has existed for 300 years, those are to be taken *primâ facie* as words of limitation only, yet there may be something in the rest of the will, in the context and in the other devises, to shew that those words ought to be taken in another sense. But then I can see nothing in the rest of this particular will which would have that effect. What immediately follows the devise to the testator's son *Henry* and his children is a bequest in default of such "issue." *Primâ facie* that would strengthen the construction that the word "children" was a word of limitation, but I do not for my own part believe that the testator had a sufficient knowledge of the legal meaning of words to attribute very much weight to that.

Then comes a gift to the second son and his children. That again would be exactly the same thing. "Children" would *primâ facie* have the sense of words of limitation. I see nothing in that.

Then comes the power. It is true that the power which was there given was one which if it was an estate tail was superfluous.

(1) 6 Co. Rep. 17.

If the testator had had a sufficient knowledge of the law, he might have been aware that he, having given an estate tail, his son *Henry* with his eldest son could, by the process of barring the estate tail, dispose of it in any way he liked, and consequently the effect was to give him a power which was not contradictory but superfluous. That might have been an argument tending to shew that giving the power was not consistent with giving an estate tail; but *Seale* v. *Barter* (1) decides that very point. If the decision in *Seale* v. *Barter* had not existed, I think I should have decided the same way, but I am content to say that *Seale* v. *Barter* is there; and that being so, I see no reason for departing from it. I think, therefore, that the existence of the power is no reason why "children" should be taken as meaning words of limitation.

My Lords, there was a farther argument used, namely, that when the word "children" is used, and there is nothing whatever to shew the contrary, it would not be a word of limitation, but a word meaning sons and daughters. But *Wild's Case* says (2) that when it is given to *Henry Warren* and his children, he having no children at the time, that gift is sufficient to shew that it is a word of limitation. I agree that if the word "children" is used in another part of the will, and is so used as to shew that the testator did not here use it in such a sense as *Wild's Case* (2) says it *primâ facie* bears, that is a sufficient reason for saying that the word "children" shall be restored again to its primary sense, and, consequently, the rule in *Wild's Case* (2) will no longer apply. But, then, when I look at what we have here, I do not find anything of the sort. The testator says, "I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property to dispose of it by their will and testament." It is plain that there he uses the words "to each of my children arriving at the possession of this landed property" as perfectly equivalent to saying "my eldest son *Henry Warren Brooke* and his children, my second son *Charles* and his children, and my daughter *Harriet Louisa* and her children, whom I have already mentioned."

(1) 2 B. & P. 485. (2) 6 Co. Rep. 17.

H. L. (I.)
1880
CLIFFORD
v.
KOE.
Lord Blackburn.

But then he says that each of them may dispose of it by will and testament" to one or to each of their children (should they have any lawfully begotten) in such manner and in such proportions as to each of them my own children shall seem meet and right and proper." Now, the argument on that point was this. It was said this shews that when he gave a power to dispose of it among the children of his own children, that must have meant their sons and daughters. Why? *Seale* v. *Barter* (1) decided exactly the contrary. There, where an estate was given to the testator's son *John Seale* and his children with a power for him to devise it amongst "them" (which referred to "children"), it was held that that meant "issue," and that *John Seale* and his children meant "issue." The word of limitation "issue" was held to be meant, and it enabled him to give it to his issue. Why should it not be so here if necessary.

The testator goes on to give a farther reason. He says, "My reason for this is" (I agree that that means giving the power) "that I think it right, as there is a title of baronet in the family, the eldest son ought to possess something more than the others, and also that I never wish to encourage disobedient children, therefore I leave this power of punishing or rewarding as each of them coming into possession of the property and having children shall deem right." Why should the word "children" there be cut down to sons and daughters, and not be interpreted as it would be according to *Seale* v. *Barter* (1)? When the power was given to *John Seale* and his children the power was held to be a power to settle it upon his issue, because "children" meant "issue." Why should it not be held here that the power to settle it amongst the children should mean amongst the "issue" in the same way? I do not think it is necessary for your Lordships to decide that at all, but, certainly, it seems to my mind very clear. If of the two I am to say, on the one hand, that "children" in the earlier part, which would be a word of limitation meaning "issue," should be cut down or restored to its original sense, because in the later part the testator speaks of rewarding obedient or punishing disobedient children, or on the

(1) 2 B. & P. 485.

other hand, I am to say that the latter words applying to the power of rewarding or punishing children are to be extended to issue, according to the sense in which the word "children" is used in the earlier part, I greatly prefer to extend the power rather than to cut down the previous devise. However that, I think, is a matter which it is not necessary to consider, and all the rest, I think, is really concluded by authority.

I do not think it is necessary to say anything more upon the subject, than that I perfectly agree with the judgment of the Court below, and I think it should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I have no hesitation whatever in holding that the interest which Sir *Henry Warren* took in the lands devised by his father's will was that of a tenant in tail and not of a tenant for life. The will contains, in substance, a devise of these lands to Sir *Henry Warren* who, at its date, had no children, and notwithstanding the argument we have heard at the bar, it appears hardly to admit of serious dispute that the terms of the devise, taken by themselves, confer an estate tail upon the devisee. It has, however, been contended that the rule of construction applicable to such a devise is not absolute, but must yield to the intention of the testator as expressed in other parts of the will, and farther, that in the context of Sir *Joseph Brooke's* will there are certain powers and explanations by the testator which evince his intention to limit his eldest son's interest to a life estate, with so much clearness that they must be admitted to control the antecedent words of disposition. The learned counsel for the Appellants had no difficulty in making good their proposition to the effect that the rule of construction adopted in this case by the Courts below, is a rule which obtains *primâ facie* only, and may be displaced by sufficient indication of a contrary intention on the part of the testator; but they have failed entirely, in my opinion, to shew that that proposition has any bearing upon the terms of the will before the House. After listening carefully to the arguments for the Appellants, I can well conceive that questions of

H. L. (I.)
1880
CLIFFORD
v.
KOE.
Lord Watson.

much difficulty may arise in regard to the quantity of evidence of contrary intention requisite in order to overcome the rule of construction established by *Wild's Case* (1). In the present case, however, it appears to me to be unnecessary to consider any question of that kind, because I am quite satisfied, for the reasons which have already been assigned in detail to your Lordships, that in reality there exists no inconsistency whatever between the words of devise, read according to the rule in *Wild's Case* (1), and the context of Sir *Joseph Brooke's* will. I therefore concur in the motion which has been made.

Judgment and order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 13th May, 1880.

Solicitors for the Appellant: *Clayton, Sons, & Fargus.*
Solicitors for the Respondent: *Whyte, Collison, & Prichard.*

(1) 6 Co. Rep. 17.

[HOUSE OF LORDS.]

THE ATTORNEY-GENERAL & EPHRAIM HUTCHINGS (RELATOR) . . . . . } APPELLANTS;

AND

THE DIRECTORS, &c., OF THE GREAT EASTERN RAILWAY COMPANY . . } RESPONDENTS.

H. L. (E.)
1880
May 25, 27.

Railway—Powers to contract—Ultra Vires.

The doctrine of *ultrà vires* as explained in *The Ashbury Railway Company* v. *Riche* (1) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as *ultrà vires*.

22 Ch D 3
23 Ch D 48

In an Act of this kind granting special powers, what is not permitted is prohibited.

Per LORD WATSON:—The test applied in the *Ashbury* case to the powers of a joint stock company (limited), registered under the *Companies Act*, 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament.

An Act of Parliament authorized a company to make a railway to *T.* and *S.* There were two other railway companies which were afterwards combined into one called the *Great Eastern Railway Company*. This latter company entered into a contract with the *T. and S. Company*, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the *Great Eastern Company*, and an injunction asked for to restrain it from executing this contract. One of the Acts relating to the two companies contained (cl. 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance, and management of the Extension railway [this was the *T. and S. Railway*], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the *Great Eastern*], and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this Act." The 15th clause of the Act was in these words, "The directors of the *T. and S. Company* and the directors of the two companies, respectively, may (subject to the sanction of the shareholders) enter

(1) Law Rep. 7 H. L. 653.

H. L. (E.)
1880
ATTORNEY-GENERAL
v.
GREAT EASTERN RAILWAY CO.

into any contracts or agreements for effecting all or any of the purposes of this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto":—

Held, that the contract of the *G. E. Company* to supply the *T. and S. Company* with rolling stock was not *ultrà vires*, but was warranted by the words of these sections of the Act.

THIS was an appeal against a decision of the Court of Appeal, by which (*diss.* Lord Justice *Baggallay*) a previous decision of the Master of the Rolls was reversed (1).

In 1852 an Act was passed (15 Vict. c. lxxxiv.), by which the *London, Tilbury, and Southend Railway Company* and the *Eastern Counties Railway Company* and the *London and Blackwall Railway Company* (the latter two being railway companies previously incorporated) were authorized to make a railway from the parishes of *East* and *West Ham*, in the county of *Essex*, to the *Southend Pier*, a branch to *Tilbury Fort*, and certain other works described in the Act as the "Extension railway." All lands (sect. 7) purchased for the purpose of the extension railway were to be conveyed to the *Eastern Counties* and *London and Blackwall Railway Companies* jointly for the purposes of the Act. Each of the said companies was to be entitled (sect. 105) to use the railway and works for all purposes necessary for the traffic or business of the company. And the companies, with the authority of a general meeting of each (sect. 109) might from time to time make and carry into effect all such mutual contracts with respect to the undertaking by the Act authorized, or the interests of any one of the companies relating thereto. Under the powers of this Act the *Eastern Counties* and the *London and Blackwall Companies* raised part of the capital for the execution of the works of the Extension railway, and entered into a contract with *Peto, Betts, & Brassey* (afterwards called The Lessees) for the construction by them of the extension railway, and for a lease to them of the same for twenty-five years from the 1st of January, 1853. By an indenture of the 25th of March, 1854, executed by the *Eastern Counties Railway* and The Lessees of the other part, it was agreed that the railway company should, during the continuance of the contract

(1) 11 Ch. D. 449, where the facts are fully detailed.

provide and maintain, and from time to time replace in good condition and efficient working order, all such rolling stock, stores, and locomotive power as should be necessary for working the traffic of the extension railway, and should haul and convey the traffic of the railway on and over the same railway and on and over the line of the *Eastern Counties Railway*, or that line and the *London and Blackwall Railway*, as therein specially described. In consideration of all which things The Lessees were to pay certain sums specified in the contract. Other Acts were passed which referred to and in that way recognised what had thus been agreed upon, and the stipulations in the contract were duly performed.

By "*The Great Eastern Railway Act*, 1862," the *Eastern Counties Railway Company*, and the other companies mentioned therein were incorporated, and all the privileges and liabilities of the *Eastern Counties Railway Company* became vested in "*The Great Eastern Railway Company.*"

In June, 1863, was passed (26 & 27 Vict. c. lxix.) "An Act to authorize arrangements between the *London, Tilbury, and Southend Railway Company*, and the lessees of their undertaking and the *Eastern Counties* and *London and Blackwall Railway Companies*, with reference to the lease and working of the *London, Tilbury, and Southend Railway*, and for other purposes." This Act recited the various matters already mentioned, and the 14th section (that on which the question in this case turned) was in these terms:—

"The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railways of the two companies connected therewith, and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic, on the extension railway, and the railway of the two companies, the appointment of a joint committee, or of any other matter incident to the carrying out of the purposes of this Act."

Section 15. "The directors of the *Southend Company*, and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of

H. L. (E.) 1880

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto."

The clauses of the *Railways Clauses Consolidation Act*, 1845, with respect to leasing railways were incorporated with this Act.

The *London and Blackwall Railway Lease Act*, 1865 (28 Vict. c. c.), enabled that company to lease the undertaking, property, and effects of the company to the *Great Eastern Railway Company*, which was authorized to accept such lease. The clauses of the *Railways Clauses Consolidation Act*, 1845, with respect to leasing railways were also incorporated with this Act. The authority granted in this Act of 1865 was acted on, and a lease was made.

The lease granted to Messrs. *Peto, Betts, & Brassey*, expired on the 3rd of July, 1875, and the *London, Tilbury, and Southend Railway Company* entered into possession, and began to work the line. It had during the continuance of the lease been worked by the *Great Eastern Railway Company*. That company, on the expiration of the lease, entered into an arrangement with the *London, Tilbury, and Southend Company* as to the working of the line, which arrangement received the sanction of the shareholders of both companies.

This arrangement was embodied in an indenture of the 1st of June, 1876, by which (sect. 18) the *Great Eastern Company* undertook to supply the *Tilbury Company* with locomotive power on certain terms and conditions therein stated, subject to the servants, and engines, and coal, and other stores required for such working being carried free of charge over the *Tilbury* line.

Mr. *Ephraim Hutchings*, the secretary of the *Locomotive Manufacturers Association*, and the *Railway Carriage and Waggon Builders Association*, became (as relator, through the Attorney-General) the Plaintiff in an action to restrain the *Great Eastern Railway Company* from letting for hire any locomotive engines, or other rolling stock, except for the purposes of traffic on another railway in extraordinary emergencies, and from manufacturing locomotives, engines, or other rolling stock, for the purpose of letting the same on hire, or for any other purpose except for the purpose of being used by the *Great Eastern Railway Company*

upon a railway, or some part thereof, worked by that company itself. The agreement of the 1st of June, 1876, was alleged as the instance of the directors exceeding their powers. The directors of the *Great Eastern Company* denied letting their rolling stock to any but the *Tilbury Company*, and justified that under the various Acts of Parliament referred to above, especially the 14th section of the Act of 1863.

On the 14th of January, 1878, the Master of the Rolls granted a perpetual injunction to restrain the *Great Eastern Company* from letting for hire any locomotive engines or other rolling stock, except for the purposes of traffic on another railway in extraordinary emergencies, or for letting the same on hire for any other purpose, except that of being used by the *Great Eastern Railway Company* upon a railway or some part thereof worked by that company. On appeal, Lords Justices *James* and *Bramwell* (*diss.* Lord Justice *Baggallay*) discharged this order of the Master of the Rolls (1). This appeal was then brought.

Mr. *Kay*, Q.C., Mr. *Bompas*, Q.C., and Mr. *Macnaghten*, Q.C., for the Appellants, contended that the various Acts relating to these companies gave the *Great Eastern Railway Company* no authority to enter into such a contract as that of the 1st of June, 1876. *Blakemore* v. *The Glamorganshire Canal Company* (2), *The Eastern Counties Railway Company* v. *Hawkes* (3), *The Shrewsbury and Birmingham Railway Company* v. *The North Western and The Shropshire Railway Companies* (4), *The Ashbury Company* v. *Riche* (5), *The Warden and Assistants of Dover* v. *The London, Chatham and Dover Railway Company* (6), were cited and commented on, on the question of railway directors being bound to abide by the express directions of the Acts conferring powers on the company.

(1) 11 Ch. D. 449. There was another question discussed in the Court below, namely, whether this was a case for the intervention of the Attorney-General. On that point the Lords declared that it was unnecessary, under the circumstances, to express any opinion.

(2) 1 Myl. & K. 154, at p. 162; 1 Cl. & F. 262.

(3) 5 H. L. C. 331.

(4) 6 H. L. C. 113.

(5) Law Rep. 7 H. L. 653.

(6) 3 De G. F. & J. 559.

H. L. (E.) 1880

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY Co.

Mr. *Chitty* Q.C., and Mr. *Newton R. Smart.* for the company, insisted that the acts done by the company were fairly within the powers of a railway company. But if that was not so, they were fully justified by the various Acts affecting the company, and especially by the provisions of the 14th section of the Act of the 1863.

Mr. *Kay,* in reply.

THE LORD CHANCELLOR (Lord *Selborne*) :—

22 Ch D 371

My Lords, the question in this case is whether, under the Acts of Parliament to which your Lordships' attention has been called, the Respondent company is authorized and empowered to let for hire to the *Southend Company* locomotive power and rolling stock. The company claims to be so entitled. The Master of the Rolls and Lord Justice *Baggallay* thought that it was not so authorized; but Lords Justices *James* and *Bramwell* thought otherwise, and they discharged the order for an injunction which the Master of the Rolls had made. The present appeal to your Lordships is from that decision.

I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company* v. *Riche* (1); It appears to me to be important that the doctrine of *ultrà vires,* as it was explained in that case, should be maintained. But I agree with Lord Justice *James* that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultrà vires.* In the present case I think, with the Court below, that the acts which the information was filed to restrain are not *ultrà vires* of the Defendant company. But I come to that conclusion, not on the ground that they are such acts, on the border line between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given, but because I think that they are expressly autho-

(1) Law Rep. 7 H. L. 653.

rized by the 14th section of the Act of 1863. It is insisted by Appellants' counsel that the 14th section of the Act of 1863 authorizes only agreements between the *Great Eastern Company* and the *London and Blackwall Company, inter se;* and that, relating as it does to the "extension," or *Southend Railway*, as well as to the railways of those two companies, they could make no such agreements until they had otherwise acquired an interest, sufficient to give effect to them, in the extension railway; and that they could only acquire such an interest by taking a lease, or a transfer of the existing lease, of that line. The Appellants, therefore, ask your Lordships to read this section as if, after the words "the two companies," with which it begins, these additional words were contained in it, "in the event of a lease or a transfer of the existing lease of the extension railway being taken by them, or either of them;" this being (as they say) necessarily implied.

It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand, would be sensible and operative without it: and it appears to me that they are so. It cannot, I think, be denied that, under the terms of that section, the two companies being authorized to "enter into agreements" with respect to the working of the extension railway, would have been empowered to make such agreements with the *Southend Company*, the owner of that railway, if there had been no existing lease, and nothing in the Act enabling them to become lessees of the extension line. The *Southend Company* and the lessees are mentioned in that part of the preamble which, in my opinion, refers by anticipation to this very power, as meant (as much as the other two companies) to be enabled to do whatever might be necessary for the purposes, of which the expediency was there declared: and their directors are also, by the 15th section, expressly empowered to "enter into any contracts or agreements for effecting all or any of the purposes of this Act." If the two companies might make agreements for the purposes of the Act which could not be made without the concurrence of the *Southend Company*, it appears to me to follow that the *Southend Company* was authorized to concur with them in such agreements. If they became transferees of the existing

H. L. (E.) 1880 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Lord Selborne, L.C.

lease, they might, perhaps, during its continuance have exercised this power without any concurrence of the *Southend Company:* but I do not think it possible to confine the powers of the 14th section to that particular case. If they took a new lease, sufficient authority was already given them, by the 4th and 8th sections, to do everything which the 14th clause contemplates, under the general words "powers, provisoes, stipulations, conditions, and agreements," as incidents to such a lease. It cannot be right to cut down by any unnecessary construction the effect of the words of the 14th section, for the purpose and with the effect of confining it to a case which, in this way, had been already provided for. If it be necessary to consider why the two companies only were mentioned in the 14th section, I should say it was because the Legislature had in view the then existing arrangements, and contemplated that, under any altered arrangements, those two companies would probably continue to undertake obligations of the like character. And I am satisfied, by reference to the preamble, that the construction which I ask your Lordships to place upon that section is proper to give effect to the expressed intention of the Legislature. In the preamble the existing lease, the existing working arrangements, and the proportionate division of tolls, &c., and of deductions for expenses, are referred to as three distinct things: and then it is recited to be expedient, that the *Southend Company*, the lessees, and the *Great Eastern* and the *London and Blackwall Railway Companies*, should be enabled to agree upon "such alterations," in each of these three things, (viz., first, "the terms of the lease;" secondly, "the arrangements for working the railway;" and thirdly, "the apportionment of the receipts and expenses,") "as by this Act authorized." It is then farther, and as a separate and distinct purpose of the Act, recited to be expedient to empower the *Great Eastern* and *London and Blackwall Companies*, jointly or severally, to take a lease or transfer of the existing lease of the *Southend Railway*, "upon such terms and conditions as by this Act authorized." The plain object of the 14th section is to authorize new agreements, generally, as to working arrangements, and as to the apportionment of receipts and expenses. Such new agreements, as to "working arrangements," are nowhere else in the Act expressly authorized.

For these reasons I think that the order appealed from is right; and I move your Lordships that the appeal be dismissed.

LORD BLACKBURN:—

My Lords, I am also of opinion that the order below was right, and that the appeal should be dismissed with costs. There have been three points on which the Court below decided, and on two of them I do not think it necessary to express any opinion. By that I do not mean to be understood or supposed to say that they were wrong, but merely to mean, literally, the thing which I say, that it is not necessary to form, and not being necessary to form, it is not necessary to suggest, any opinion whether they were right or wrong. I take it that, as far as the main point to be considered is concerned, this House has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived at; more particularly I allude to the last case of *The Ashbury Railway Carriage and Iron Company* v. *Riche* (1). That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the *Great Eastern Company*, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose.

My Lords, I quite agree with what Lord Justice *James* has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited. But the point on which I desire to say that I neither form nor express any opinion, is whether or not the Court below might be right in saying, on the question to which the injunction was directed, namely, the lending or manufacturing of rolling stock for the purpose of lending it to the *Tilbury Company*, that that was permitted in the particular local instance of the *Tilbury Railway Company*. I agree with my noble and learned

(1) Law Rep. 7 H. L. 653.

H. L. (E.) 1880 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Lord Blackburn.

friend on the woolsack in thinking, when we look at the Act of Parliament, that the Legislature in this case has, not merely impliedly, but expressly, authorized the directors of the *Great Eastern Railway Company* to do all that they have done, namely, to enter into arrangements with the *Tilbury Company* respecting the working of that line, by which they were to supply that line with all the locomotive power, carriages, and other rolling stock which were required for working that line. I think that is not merely impliedly authorized, but is expressly authorized, by the Act of Parliament in question, 26 & 27 Vict. c. 69, and particularly by the 14th section.

It must be remembered, that at the time that Act was passed the two companies (now combined as the *Great Eastern Railway Company*, but then known as the *Eastern Counties* and the *London and Blackwall Railway Companies*), and the *Tilbury Company*, were altogether separate companies. I should say, farther, that the *Tilbury* line had been let for a limited period, namely, twenty-one years, to Messrs. *Peto & Co.*, who were the lessees of the line; and there was, in fact, an agreement made, by which the *Eastern Counties Company* agreed with Messrs. *Peto* to work the line for them, in the sense that, during the existence of that agreement or lease, they were to furnish all the locomotive power and rolling stock, and do all those things which the present application is intended to prevent. That arrangement, though certainly not expressly authorized, has been impliedly sanctioned by some allusions to it in previous Acts. It is in the Act now in question recited that there was such an agreement; and, having recited that, the preamble proceeds to say what it is now desirable to do. It says: "And whereas it is expedient that the *London, Tilbury and Southend Railway Company*, The Lessees, and the *Great Eastern* and *London and Blackwall Railway Companies* respectively should be enabled to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this Act authorized; and that the *Great Eastern* and *London and Blackwall Railway Companies*, jointly or severally, should be empowered to take a lease or transfer of the existing lease of the *London, Tilbury and Southend Railway*, upon such terms and conditions as by

this Act authorized." I think that those words, "such terms and conditions as are by this Act authorized," may be properly considered to override the whole. One of the conditions is, that it is expedient that the companies should be authorized "to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, as by this Act authorized." This is merely the preamble reciting what is desirable; then it proceeds, "And whereas the several purposes aforesaid cannot be effected without the authority of Parliament," and the Act proceeds to carry the purposes into effect.

Now, it was urged that "the arrangements for working the said railway," *primâ facie* and naturally, would mean the then existing arrangements between the *Eastern Counties* and Messrs. *Peto & Co.*, the lessees. It would embrace that undoubtedly, but I do not think it is confined to that. I do not think it would have been at all necessary, if it had been confined to that, that the *London and Blackwall Railway Company* and the *London, Tilbury, and Southend Railway Company* should agree upon altering the terms of an arrangement between Messrs. *Peto* and the *Eastern Counties Railway Company* with which these two other companies had nothing whatever to do. It seems to me that the more natural and plain meaning of this preamble is that all the arrangements for the time being for the working of the railway are to be altered as the companies may require, in such manner as by this Act subsequently authorized.

Now, my Lords, passing from the preamble, the earlier sections down to the 13th contain nothing expressly authorizing any alteration in the arrangements. It has been attempted to be argued that the 4th section does this impliedly, but there is nothing certainly pointed to this effect. Then comes the 14th section, and it says: "The two companies"—that is the *Eastern Counties* and the *London and Blackwall Companies*—"may enter into agreements in respect to the working, maintenance, and management of the *Extension Railway*, or any part thereof." Now that seems to me distinctly to mean, following up the preamble, that it is desirable that they should be able to make such alterations in the arrangements as the two companies may agree upon. What alterations are these? That the two companies may enter into agreements with respect to the working. I will leave the other point out of

H. L. (E.) 1880 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Lord Blackburn.

the way for the moment. Enter into arrangements with whom? Certainly they cannot alter the working whilst the line is in the hands of the lessees without entering into an agreement with the lessees. If it is in the actual occupation of the *Southend Railway Company* itself, they cannot alter the arrangements without entering into an agreement with that company. Therefore it seems to me that the natural effect, taking the ordinary meaning of the words, would be that the two companies are authorized to enter into agreements with those who would be the necessary parties to it; and I should think, without more, that that would necessarily imply that the party with whom they were to make the agreement had authority to make it; but I must own, notwithstanding what Mr. *Kay* said in his reply, that it does not strike me that the *Southend Company* needed any authority to enter into any agreements for the purpose of working the line. I quite agree that a company cannot make a lease without the authority of Parliament. That has been expressly decided, and I quite agree that where an agreement under the shape and colour of a working agreement really amounts to a lease, so as to be a delegation of the whole concern and all its powers, that is as operative as a lease itself. But I do not think that the agreements that are here pointed to, and the agreements that were actually made, do in the slightest degree amount to a lease. I can see no reason why the *Southend Company* might not make an agreement with an individual, and say, Instead of our buying and making and keeping locomotive engines of our own, we will contract with you that you shall supply locomotive engines, and instead of our buying and becoming possessors of carriages of our own, we will hire them; or why they might not say, Instead of ourselves keeping up and maintaining our own railway, we will make an agreement with you, a contractor, who shall keep up the railway and maintain it. This does not amount to delegating the powers of the company; it does not amount to doing anything extraneous to the powers which the company has obtained, and I cannot see that it would need parliamentary authority to enable them to do any one of these things. I cannot help thinking that the fallacy of the argument there is, that it supposes that whilst the *Eastern Counties* and the *London and Blackwall Railway Companies* required parliamentary authority to apply their funds for the purposes of supplying locomotive engines, it follows that

the *Southend Company* would have required parliamentary authority before they paid for the hiring of those engines.

That does not seem to me to follow at all; but probably it is not necessary to decide anything of the sort; for I think the true construction of the 14th section is that when it is said you may make an agreement for working the railway, that necessarily means you may make an agreement with those who possess and occupy the railway as to which the agreement is to be made; and if it is necessary, it would by implication follow, not only that the two companies are authorized to make that agreement, but that the other company is authorized to enter into that agreement also.

Now, taking that view of the section, it will follow that all that the Defendants, the now Respondents, have done, and all that they propose to do, and all that the Appellants have applied to enjoin them from doing, namely, letting for hire and manufacturing for the purpose of letting for hire, to the *Tilbury and Southend Company*, rolling stock, is expressly authorized by the terms of this Act, and, consequently, on that ground, and without anything farther, the application must fail.

I have already said that the first point is one on which I wished to express no opinion as to whether or not this particular thing does come within the ordinary powers of a company. The second point, which is whether or not the case is a proper one for the Attorney-General to interfere in, and to what extent the powers of the Attorney-General in such cases go, is one which I consider of great importance, and whenever it becomes necessary to decide that question I should desire to look into it very carefully, and to consider carefully what was the proper doctrine to be applied in such a case; but in this case, after the decision which I would advise your Lordships to come to, and which I believe the House will come to, that sect. 14 expressly authorizes the company to do all that it has done, it is quite unnecessary to decide anything on that last point, on which therefore I neither express nor form any opinion.

LORD WATSON:—

My Lords, the main question in this appeal is, whether it was *ultrà vires* of the Respondents to let for hire to the *London, Tilbury, and Southend Railway Company*, rolling stock and loco-

H. L. (E.) 1880 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Lord Watson.

motive power upon the terms and conditions embodied in an agreement between the two companies dated the 1st day of June, 1876. If that question be decided in the affirmative, the point which has been so fully argued in regard to the power of Her Majesty's Attorney-General does not arise for decision in the case.

I cannot doubt that the principle by which this House, in the case of the *Ashbury Railway Company* v. *Riche* (1), tested the power of a joint stock company registered (with limited liability) under the *Companies Act* of 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication. It follows that the *Great Eastern Company* has exceeded its statutory powers unless it can be shewn that the company has statutory authority, express or implied, to let rolling stock and plant on hire to the *Southend Railway Company.*

The *Great Eastern Railway Company* has absorbed the undertaking and has become vested with the whole powers and privileges of the *Eastern Counties* and *London and Blackwall Companies*, both of which were in intimate relation with the *Southend Railway Company.* A railway was constructed by those two companies in virtue of statutory powers which proceeded upon the recital that "If such railway were constructed and worked in connection with the *Eastern Counties Railway* and the *London and Blackwall Railway*, the same would be of great public advantage." The cost of construction was met by the issue of new shares called *London, Tilbury, and Southend* extension shares; and the undertaking was managed by a joint committee appointed by the boards of the two companies. Had matters continued in that position until 1877 the present question as to the power of the *Great Eastern Company* could hardly have arisen. Indeed it was not contended for the Appellants that prior to the passing of the *London, Tilbury, and Southend Extension Act*, 1862, the *Eastern Counties* and *London and Blackwall Companies*, or either of them, had not the right to make an arrangement for working the *Southend*

(1) Law Rep. 7 H. L. 653.

Railway with their own plant. But the Appellant maintained that any such implied power was necessarily brought to an end by the change which that Act operated upon the relations previously subsisting between the two companies and the *Southend* undertaking; inasmuch as the holders of *Southend* shares were thereby constituted a separate and independent corporation, in which both the undertaking and its management became thenceforth vested.

I should have had great difficulty in determining whether, and how far, any rights to make arrangements for working the *Southend* line, of the character of those under the consideration of the House, were impaired by the creation of the new company, having regard first to the professed purpose of the Act of 1862, which, according to the preamble, was to give the proprietors of the *London, Tilbury, and Southend Extension* shares, that which they had not before, "a voice or control" in the management of the railway and the appointment of directors; secondly, to the fact that two-thirds of the *Southend* board of directors must be nominees and also members of the respective boards of the *Eastern Counties* and *London and Blackwall Companies*; and, thirdly, to the broad terms of that section of the Act, sect. 32, which saves the rights, powers, and privileges previously vested in these two companies.

But, my Lords, it is not necessary to decide these various questions, because I agree with your Lordships, and the majority of the Court of Appeal, in thinking that the required power is conferred upon the Respondents in express terms by the *London, Tilbury, and Southend Railway Act* of 1863.

The 14th section of that Act provides that the two companies now represented by the Respondents "may enter into agreements with respect to the maintenance and management of the extension railway or any part thereof." These words, according to their natural meaning, seem to me to give the two companies direct authority to agree with any person or corporation having power to contract on behalf of the *Southend* undertaking, to supply locomotives and rolling stock upon terms similar to those contained in the agreement of the 1st of June, 1876, between the *Great Eastern* and the *Southend Companies*.

It is contended, however, that the power conferred by sect. 14 is merely a power to the two companies to enter into mutual

H. L. (E.) 1880

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Lord Watson.

agreements, in the event of both or either of them becoming lessees or lessee of the *Southend* line under the provisions of sect. 4.

The language of the 14th section expresses no such limitation, nor does it, in my opinion, warrant the inference that any such limitation was contemplated. And the able argument for the Appellants has failed to satisfy me that the context of the Act necessitates a construction of sect. 14 limiting the powers thereby conferred upon the two companies to agreements *inter se.*

An examination of the preamble and enacting clauses of the Act leads me to these conclusions—that the separate head of the preamble regarding "arrangements for working the said railway," does not refer to leases or to alterations and readjustments of existing apportionments of tolls and charges, but to future arrangements similar in character to the working agreement at that time subsisting between the *Great Eastern Company* and Messrs. *Brassey & Co.*, the lessees—that the only enactments which meet that head of the preamble are to be found in sect. 14; and that these enactments, when read according to their *primâ facie* signification, more fully satisfy the preamble than when read according to the narrower construction now suggested.

Again it is said that if the wider construction be adopted the object of the clause would fail, because the *Southend Company* never possessed, and there has not been expressly conferred upon it, any power to enter into a working agreement which amounts to a delegation of its statutory powers. But I entirely agree with your Lordships that such a power on the part of the *Southend Company* is fairly derivable from these provisions which give authority to the *Southend* and *London and Blackwall Companies*, when taken in connection with the other provisions of the Act.

I therefore concur in the judgment which your Lordships have expressed.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 27th May, 1880.

Solicitors for Appellant: *Hargrove & Co.*
Solicitor for Respondent: *Capel A. Curwood.*

[HOUSE OF LORDS.]

SMITH . . . . . APPELLANT; H. L. (Sc.)
ARCHIBALD AND OTHERS . . . . . RESPONDENTS. 1880
March 8.

Public Well—Public Health (Scotland) Act, 1867, *s.* 89, *sub-s.* 4—*Servitude—Right of Local Authority to repair a Well on Private Property.*

The *Public Health (Scotland) Act*, 1867, s. 89, sub-s. 4, provides, that, "The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water.

Situated in one corner of a private field in the parish of *Denny* is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of *Denny* there is a cart road. The inhabitants of *Denny* had for the prescriptive period used the water of the well for domestic purposes, and had had the well, *inter alia*, cradled with stones at their own expense. Up to 1877 *Denny* was a mere village without any burghal territory. But in that year *Denny*, with the adjoining village of *Dunipace*, was constituted a police burgh under the provisions of 25 & 26 Vict. c. 101, and the police commissioners of the burgh then became the local authority under the *Public Health (Scotland) Act*, 1867 (30 & 31 Vict. c. 101).

In 1878 the commissioners, in their character as local authority, and under the authority of sub-sect. 4, sect. 89, of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a hand pump with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against the local authority praying for removal of the cover and pump, &c.:—

Held, affirming the decision of the Court below, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers.

APPEAL from the Second Division of the Court of Session, *Scotland.*

The Appellant, Mr. *Adam Smith*, is the proprietor of the lands of *Boghead*, in the parish of *Denny*, and in the immediate vicinity

H. L. (Sc.) 1880 SMITH v. ARCHIBALD.

of the village of that name. The Respondents are the police commissioners of the burgh of *Denny* and *Dunipace:* which were erected into a burgh in 1877 under the provisions of the *General Police and Improvement Act*, 1862 (25 & 26 Vict. c. 101). They then became the local authority under the *Public Health (Scotland) Act*, 1867 (30 & 31 Vict. c. 101). Prior to 1877 *Denny* and *Dunipace* were mere villages under different local authorities, neither being a burgh of any kind.

In one corner of the Appellant's lands of *Boghead* a well is situated, surrounded by a sort of horse-shoe fence with an opening not closed by a gate. An ordinary cart road leads from the high road, going through *Denny*, to the entrance of the field; and from this entrance a footpath runs past the well, crossing a small run of water called the *Sclander's Burn*, it then continues on through the fields, crossing a line of railway in the direction of the farm steading of *Cuthilton*. It appears that the inhabitants of *Denny* have from time immemorial used the well for a gratuitous supply of water. The Respondents, in 1878, conceiving that the well was a public well, within sub-sect. 4 of sect. 89 of the *Public Health (Scotland) Act*, 1867, caused, without notice to the Appellant, the masonry round the inside of the well to be repaired and part of the surrounding land to be raised to a level with the rest, with the object of preventing the well being polluted by the breaking away of the margin, and by the overflow of the *Sclander's Burn* when in flood. They then had the well cleaned out and an iron cover, about four feet across, placed on the well, with a hand pump therein to enable the people to pump out the water.

The Appellant, as soon as he became aware of these proceedings, and considering that the well was his private property, brought a process of interdict, in which he prayed the Court of Session

To interdict, prohibit, and discharge the Respondents, and all persons acting or pretending to act under their authority, or in their names, from entering and trespassing upon the complainer's lands of *Boghead*, near *Denny*, and from making, sinking, or "cradling" wells, or erecting pumps or other appliances, in, upon, or in connection with any well or spring of water in the said lands, or otherwise using, appropriating, or interfering with the said well or spring; and also from occupying or possessing any part of the said lands, or laying down any materials thereon, or interfering with the surface or levels thereof, except in so far as authorized by or in conformity with the provisions of the *Public Health (Scotland) Act*, 1867; and also from entering or trespassing upon the said lands, or any

part thereof, for the purpose of using any well or spring of water therein, and taking, drawing, or removing any water therefrom, or in any other way interfering with the complainer's right of private property in the said lands; and further, to ordain the said Respondents to remove and take away a pump and gearing or other machinery for raising water, which they have erected, or are in the course of erecting in, upon, or in connection with a spring of water or watering-place upon the complainer's said lands; and also to remove and carry away all stones, earth, cinders, or other materials placed by them on the said lands, or surrounding the said spring or watering-place, and adjoining thereto, and to restore the same to the state or condition in which they were prior to the operations complained of, and that within such period as your Lordships may determine; failing whereof, to grant warrant to the complainer to remove and restore, &c.

A proof was adduced which went to shew conclusively that the well is situated in the Appellant's property of *Boghead*; that the inhabitants of *Denny* have from time immemorial been in use to take water from the well by dipping a pitcher or other vessel into the well; that in 1807 and 1811 the inhabitants of *Denny*, by public subscription, repaired the well, and lined it with an inner coating of hewn stone; and that later, in 1874, the parochial board of *Denny*, acting as the then local authority, put in an overflow pipe to discharge into the *Selander's Burn*, and put down a flagstone across the burn to give better access to the well. On the other hand, it did not appear that the proprietor of *Boghead* had ever interfered with the well, or performed any act of proprietorship.

The Appellant averred *inter alia*:

(Statement 3.) The property of *Boghead* consists of three grass fields, besides a villa named *Duncarron*, and garden and shrubbery surrounding the same, with stable, and coach-house, and offices connected therewith. The entrance to the southernmost of the fields is by a private access belonging to the complainer passing through the lands parallel with the shrubberies of *Duncarron* and the northernmost field of *Boghead*. The access commences at the public road leading from *Denny* to *Falkirk*, and terminates at the entrance to the said southmost field, which at that point is bounded on the north by a small run of water called "*Sclander's Burn*." The said entrance was formed on and is part of the said lands of *Boghead*, belonging to the complainer, and is his exclusive property.

The statements having set out where the well was situated, and what the Commissioners, the Respondents, had done, continued:

(Statement 6.) The operations which have been or are in the course of being carried out by the said Respondents have not been executed or performed by them in the exercise of any statutory power or authority, and are entirely illegal and unwarrantable. Not only were they not sanctioned or agreed to by the com-

H. L. (Sc.) 1880 SMITH v. ARCHIBALD.

plainer, but they have been carried out by the Respondents surreptitiously and without any notice of any kind having been given to him.

(Statement 7.) The said spring of water or watering-place, and the said lands of *Boghead* on which it is situated, are the exclusive property of the complainer, and the Respondents had no right or title to erect any pump or gearing in, upon, or in connection with the said spring or watering-place, or to use, appropriate, or in any way interfere therewith, or lay down any materials on or alter the level of the complainer's land; and neither the Respondents nor the members of the public have any right of access to the said lands, nor right or title to enter upon the same, for the purpose of using the said spring or watering-place, or drawing or removing water therefrom.

(Statement 8.) The proceedings complained of will prejudicially affect the amenity and value of the complainer's said lands of *Boghead*, and cause great loss and damage to him. He has been deprived of the use of the spring or watering-place which he previously enjoyed, and the access to his lands, as well as the drainage thereof, have been prejudicially affected by the operations complained of.

The Respondents averred:

(Statement 2.) The spring of water or well referred to in the note of suspension, which had been used from time immemorial for the gratuitous supply of water to the inhabitants of the surrounding neighbourhood, within the limits of the Respondents' authority, having become polluted through the side of the well or circular pool next the *Sclander's Burn* having been broken down or lowered by being trodden upon by the parties using the well, the Respondents deemed it to be necessary, in the exercise of their duty, and for the protection of the public health, to cause the well to be covered, and to place a pump thereon, and with that view to level the top of the well; all of which was accordingly done on the 1st of August current, between the hours of ten o'clock forenoon and two o'clock afternoon. The said operations were carried on and completed without any objection on the part of the complainer; and were, in the opinion of the Respondents, necessary, or at all events expedient, in the interest of a considerable portion of the inhabitants of *Denny*, who depend upon the said well for their supply of water for domestic use.

(Statement 3.) The said well had been previously either wholly or partially covered, and had also been separated either wholly or partially from the complainer's lands by a wall or railing, within which the inhabitants enjoyed the unmolested privilege of access while exercising their rights of drawing water from the well.

The material pleas in law for the Appellant were as follows:—

(1.) The spring of water or watering-place referred to, and the lands on which the same is situated, being the exclusive property of the complainer, the Respondents had no right or title to place a pump in, upon, or in connection with the said watering-place, or lay down materials on or in any way use, appropriate, interfere, or alter the level of the said lands.

(2.) The operations complained of not having been executed by the Respondents in the exercise of any statutory power or authority, and having been carried through surreptitiously and without the sanction of the complainer, or

any notice thereof having been given to him, the same were wrongful, illegal, and unwarrantable.

The pleas in law for the Respondents were, *inter alia*:

(2.) The said spring of water or well having been used for the gratuitous supply of water to the inhabitants of *Denny*, the Respondents were entitled to protect the same from pollution, and the operations complained of having been executed with that object, the complainer is not entitled to interfere therewith.

(3.) The spring of water or well referred to, and the access thereto, having been used by the public from time immemorial, the complainer is not entitled to the interdict sought by him.

The Lord Ordinary (1), holding that the well was a private well in the sense of the *Public Health Act*, pronounced, on the 8th of January, 1879, an interlocutor granting the interdict as prayed. The Respondents reclaimed to the Second Division, who, on the 19th of March, 1879, treating the question as a possessory one, recalled (Lord *Ormidale* dissenting) the Lord Ordinary's interlocutor, repelled the reasons of suspension, and refused the interdict (2).

On appeal,

March 5, 8. *The Lord Advocate* (Right Hon. *W. Watson*), and Mr. *Benjamin*, Q.C., appeared for the Appellant:—

The contention here had been reduced to the one point, whether this well, situated in the Appellant's field, was or was not a public

(1) Lord *Adam*.

(2) Court of Sess. Cas. 4th Series, vol. vi. p. 858; 16 Scotch Law Rep. 464. The Lord Justice Clerk said:—"I see nothing in the evidence to lead me to suppose that this has ever been other than a public well; but at all events, in this possessory question, I am of opinion that its long-continued use for a gratuitous supply of water to the public gives it a character sufficient to entitle the local authority to continue the possession until some contrary right is formally established. I am inclined to think that the section of the statute referred to extends the right of the local authority to all wells used immemorially for such gratuitous supply; and that the long-continued possession cannot be inverted under an application of this kind. The difficulty which is set up on the other side arises out of the fact that this village of *Denny* is not, in any sense, a corporate community, capable of receiving or retaining for itself and the public any real right of this nature; and it is contended that a mere aggregation of inhabitants, not constituting a burgh of barony or otherwise, cannot acquire it. In the present case, however, which relates to possession and not to title, it does not appear to me necessary to resolve that question. The

H. L. (Sc.) 1880 SMITH v. ARCHIBALD.

well in the sense of the 4th sub-sect. of sect. 89 of the *Public Health (Scotland) Act.* The Appellant did not object to the inhabitants using the water, and it might be that a servitude of use had been constituted; but such a right did not give the local authority any title or right to interfere with this well. It was a different question if the well was tainted with impurities, then the local authority could have had it closed; but even then they could not act without first giving notice to the proprietor and going through the regular proceedings set out in sects. 16 to 20 of the statute. But the well was not alleged to be impure; and the servitude of use did not make the well a public well in the sense of the 89th section of the statute, or give the Respondents any authority or right to interfere with it and alter its character as they had done.

In the Court below, the Lord Ordinary held that a right of the nature of a servitude did not authorize the Respondents to act as if they were the proprietors of the well. In the Court of Session Lord *Ormidale* was of opinion that as *Denny* was not a corporation until 1877, no right of servitude had been constituted in favour of the inhabitants; being of opinion, on the authorities of *Home Milne* v. *Young* (1), *Mackenzie* v. *Learmonth* (2), and *Henderson* v. *Earl of Minto* (3), that a servitude to the use of a well situated on the property of another could not be acquired by the inhabitants of a village simply as such. However, the Appellant did not insist on that doctrine. Then the Lord Justice Clerk and Lord *Gifford* took a view of the case which was not raised in the pleas or argued before them, viz., that this was a possessory question. But the real question before the Court was that of title; on that the parties had joined issue. It could not be conceived how this question of title could be determined better in a declarator, as suggested in the Court below, than in the process of interdict

---

Respondents, as the Police Commissioners, have an undoubted *locus standi* to vindicate any right possessed by the community which they represent; and if that community have enjoyed that right in perpetuity on any title, that is sufficient to regulate possession until the question of title is raised and decided in a declarator."

(1) Court Sess. Cas. 2nd Series, vol. ix. p. 286.

(2) Ibid. vol. xii. p. 132.

(3) Ibid. vol. xxii. p. 1126.

and suspension raised by the Appellant. One was as competent as the other (1).

Then, again, if an action of declarator was raised by the Appellant, everything having been already adduced, the same statements, pleas, and evidence would again come before the Court, and the Appellant would be met by the plea of *res judicata*.

It was clearly established that where you have a burgh using a well immemorially, that the right acquired is the right of servitude, and not a right of the nature of property: see Lord Ordinary's interlocutor in *St. Clair* v. *Magistrates of Dysart* (2). And it could not be said that an aggregate of individuals could obtain a better right than a properly constituted corporation. The Respondents' view was that there had been a dedication from time immemorial of the well to the public, which gave them an absolute right to it, but for this doctrine there was no authority; and the Appellant submitted no such right is recognised in the law of *Scotland*, as in a question between a private individual and members of the public. In fact, that question was raised and decided adversely to the public in *Dyce* v. *Hay* (3). In *Sanderson* v. *Lees* (4), which was a case between the inhabitants and the magistrates of a royal burgh, it was held that by immemorial usage the inhabitants of the town had acquired a right of golfing over the links of the town; but the distinction between that case and the public claiming a similar privilege over property of a private individual, was again adverted to and recognised. In *Race* v. *Ward* (5) it was held that water as it issues from the well is not to be considered as produce of the soil, so as to make the right to take *in alieno solo* for domestic purposes a profit *à prendre*, such a right is an easement.

But the Respondents have deliberately challenged the Appellant's title to the well by what they did on the 1st of August, 1878;

(1) See Erskine, 4, 3, 20; Mackay's Prac. Court Sess. Cas. vol. i. p. 360; *Earl of Fife* v. *Magistrates of Banff*, Court Sess. Cas. 1st Series, vol. viii. p. 137; *Ministers of Edinburgh* v. *Magistrates of Edinburgh*, Ibid. vol. xvi. p. 400; *Colquhoun* v. *Paton*, Court Sess. Cas. 2nd Series, vol. xvi. p. 206; *Sanderson* v. *Lees*, Ibid. vol. xxii. p. 24; *Laird & Sons* v. *Clyde Trustees*, Ibid. 4th Series, vol. vi. p. 756; *Grahame* v. *Magistrates of Kirkcaldy*; Ibid. 1066; 16 Scot. Law R. 676.

(2) Feby. 10, 1779, Morr. 14,519.

(3) Court Sess. Cas. 2nd Series, vol. xi. p. 1266; affirmed 1 Macq. 305.

(4) Ibid. vol. xxii. p. 24.

(5) 4 E. & B. 702. 1 Jur 45.704

H. L. (Sc.) 1880 SMITH v. ARCHIBALD.

their proceedings were not for the purposes of keeping up the old servitude, but with the object of excluding the Appellant. The statute (30 & 31 Vict. c. 101) in Part VI., after dealing with drains and sewers, went to water supply; and it contemplated two different systems, one for large towns, and the other for villages like that here. For towns such as *Denny* the village pump supplemented by the erection of others replenished by the introduction of water by pipes from the neighbouring springs, would be sufficient. Every sub-section in this section 89 of the statute referred to the local authority becoming water suppliers and giving them power to charge for such water; then sub-sect. 4 is put in to protect the poor, so that they may still have the old wells maintained free. The Legislature never intended that under this section a man's private property was to be invaded. "Public well" meant not a well only used, but one owned by the public, and the word "gratuitous" was to distinguish those wells in the market place, &c., which were free from those where a charge was made. [They also commented on *Breadalbane* v. *M'Gregor* (1), where this House held that the use of certain resting stances on a drove road passing through the estate of Lord *Breadalbane* could not be acquired by traders in cattle by prescriptive use.]

Mr. *Farrer Herschell*, Q.C., and Mr. *Mair* (of the Scotch Bar), for the Respondents, argued that the Appellant had abandoned point by point what he claimed in the Court below. He had reduced the case to a mere question of cover and pump. The Respondents set up no claim of property in the well, all they claimed was the right to draw water and all such access and acts as would enable them to use the well. [LORD O'HAGAN:—You are now of accord.] The one question remained, that they claimed it was a public well within the meaning of the section; but it being so puts no greater burden on the owner of the soil. They claimed to do all the inhabitants could do before. The soil round the well is not the well, that, they did not claim; just the same as a right to travel over a highway does not mean that the soil of the highway belongs to the public, but that the public have a right of way. The Act said, "may maintain the well," that is, that the local authority can do all that the public, who before used the

(1) 7 Bell's Apps. 43.

well, can do to preserve it. Then came the question, Had the local authority done more? They had not taken more water, nor more land, as the plate on the top just covered the well. But they have erected a pump where before a pitcher was put down; then it came to this, that if they have erred at all, it was in putting on the cover and pump—a very trifling excess. They maintained, therefore, that the burden on the land had not been increased, and that the section of the Act applies to this well.

The Lord Advocate, in reply:—

The Respondents did the acts complained of surreptitiously, and as the exercising of a right of property; and it is not within the right of a servitude to make such alterations on the property of another without notice. The 89th section of the Act is dealing with waterworks. Sub-sects. 1, 2, 3, 5, and 6 all go on the assumption that the local authority have brought themselves within the Act by becoming water suppliers; and the sub-sect. 4 must be read as regards wells which are a part of the system, and as not applying to wells which are private property, though subject to a servitude of use.

LORD HATHERLEY:—

My Lords, in this case a question has been raised with reference to the powers exercisable by Commissioners under certain local Acts for the improvement of towns and for preserving the health of towns in *Scotland,* and the question which arises is this, whether or not the Commissioners in carrying into effect the objects of their Acts of Parliament, and vested with considerable powers for that purpose, have exceeded those powers.

There is one part of the case upon which I think your Lordships will have no difficulty whatever. The question has arisen (to some extent collaterally, but principally, no doubt, from the form in which the proceedings were instituted in the Scottish Courts) as to whether or not what has been done by the Commissioners, and which is resisted by the proprietor of a certain well, does or does not amount to a claim of right on the part of the Commissioners to the *solum* in which that well is situated. The case is this: Mr. *Smith,* the Appellant, is the undoubted proprietor, as it appears to me (and as far as the argument at your

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Hatherley.

Lordships' bar has gone, his proprietorship is unquestioned) of the property in which the well in question is situated; he sets forth his conveyance; he asserts his right of property in his pleadings, and nobody denies it. That is a most remarkable part of the case. In no part of the proceedings can you find the Respondents denying the right of the Appellant in the present case to the well. The right on the part of the Appellant being clear, and there being, I think, equally clear evidence of his exercising his right, the inhabitants of the district called *Denny* (which does not appear to be an incorporated burgh) had been from a time which according to Scottish statutes gives a prescriptive right, in the habit of exercising the privilege of dipping their vessels into this well in order by means of such dipping of their vessels to carry the water off for use at their own homes, or in such other manner as they thought fit. That again, though it appears to have been disputed in the Court below, can hardly be said to have been in dispute before your Lordships, because before we rose on the last occasion on which the House sat, it appeared to be conceded on both sides that this particular modified privilege or right of taking water from the well, and the right of access to the well for the purpose of taking that water, and so far of traversing the *solum* and the pathway for that purpose, was established by the evidence, and it was not disputed at your Lordships' bar.

But then it is said that this being so, the right which the inhabitants have had of using the water in the mode which I have described, does not in any way through the medium of the Act of Parliament creating the powers of the Commissioners extend to vesting in these Commissioners the power of asserting that right as representing by virtue of the Act of Parliament all those powers and privileges which the inhabitants themselves could have asserted if matters had remained in their former condition, and no Act of Parliament had ever been passed; and that really comes to be the question in the case, that is to say, what is the extent of the power vested in the Commissioners under the Act, and whether or not by anything that they have done in this case they have exceeded that power?

But, my Lords, in the first place, it will be desirable to ascertain what are the actual facts, and what have been the dealings of the Commissioners with regard to the well in question. The well

seems not to have been a very deep well. I think in answer to one question it was said that it was three feet deep. (I am not aware whether that was stated in evidence, or whether it was a reply given at the Bar in answer to a question put by one of your Lordships); it is surrounded by something which is described not as an enclosure, but as a sort of horse-shoe fence which surrounds the circle of the well at some little distance from it, there being an opening at one particular place, not closed by a gate, through which opening a path formed of cinders leads up to the well in question, so that persons desirous of using the well can get access to it. It seems to be a perennial spring, continually filled with water, which appears to have been valuable to the different inhabitants of *Denny*, who give their opinions of its merits—some of them declaring that it is particularly advantageous to be used for mixture with spirits, and others that it is remarkably well adapted for making tea. For those combined purposes, and for others for which water might be valuable, the well has been for sixty or seventy years used in the mode that I have described.

That being the case, the Respondents, representing the Commissioners, has, as a matter of fact, done this—They have caused this open well into which the pitchers were dipped to be covered by a cover which closed in the top of the well. It is said that some part of the cover projected a little beyond the old circle of the well, but there is no very distinct evidence of that having taken place. It is proved in the case that there is no damage done to any of the surrounding portion of the property on which this well is situated. Some question has been raised as to whether carts could get there, but the evidence, I think, is quite conclusive that there is nothing in the cover of the well which would prevent the access of a cart into the corner of the field in which the well is situated, in the manner to which they were formerly accustomed.

That being the condition of things, the Commissioners having, as I have said, put this cover on the well, of course, there being a cover, there must be some means of people getting the water otherwise than by dipping their pitchers in. For that purpose the Commissioners have placed a pump upon what they thought the most convenient place, and this pump is the instrument by which the water is raised and brought to the pitchers, instead of the pitchers being let down into the well.

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Hatherley.

Under these circumstances, however, the question arises as to whether the Commissioners had any right to place it there at all. Because the place was convenient, or because other people may have had a right to go there, the Commissioners cannot claim the right themselves to go there without some authority being vested in them to do so, and the whole of the proceedings in the present case have been for the purpose of ascertaining whether by virtue of the Act of Parliament to which I just now referred, the right became vested in the Commissioners so as to authorize these acts which have been done, and which appear to me from the evidence to have been done without any claim of right to the *solum* having been raised or established, and solely for the purpose of protecting the water in the well.

The Act of Parliament of 30 & 31 Vict. c. 101, s. 89, says this: "With respect to the improvement of burghs having a population of less than ten thousand, according to the census last taken, and not having a local Act for police purposes, and with respect to parishes (exclusive of any parts of such parishes as are situated within the district of any local authority other than the parochial boards of such parishes)." Then follow several sub-sections. The 1st sub-section is this: "The local authority, if they think it expedient so to do, may acquire and provide, or arrange for a supply of water for the domestic use of the inhabitants, and for that purpose may conduct water from any lake, river, or stream, may dig wells, make and maintain reservoirs, may purchase, take upon lease, hire, construct, lay down, and maintain such waterworks, pipes, and premises, and do and execute all such works, matters, and things as shall be necessary and proper for the aforesaid purpose, and may themselves furnish a supply of water, or contract or arrange with any other person to furnish the same; and for the purposes aforesaid the local authority shall be held to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts. Provided always, that they shall make reasonable compensation for the water so taken by them, and for the damage which may be done to any lands by reason of the exercise of the powers hereby conferred in terms of the said Acts." This sub-section seems to be a clause in which a variety of powers is given to be vested in the Commissioners. They are all classed together.

I cannot quite agree with the Lord Advocate in that part of his argument in which he contended that we are bound to consider all the subsequent sub-sections as governed by the first sub-section. At the beginning of the clause before the sub-sections, we find a short recital indicating that in places not having a certain machinery which has been appropriated to places of a larger description, there shall be certain regulations as regards water supply. The first of those regulations is, that the Commissioners may provide a supply of water by means of buying the water of any existing company; or by forming or obtaining waterworks of their own. The second sub-section is that, "If any house within the district is without a proper supply of water at or near the same, the local authority shall compel the owner to obtain such supply and to do all such works as may be necessary for that purpose." That is a totally independent branch from the first sub-section. The second sub-section contains further powers, which are conferred upon the Commissioners. Then the third sub-section is, "The local authority if they have any surplus water after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths and washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied: Provided, that when water is thus supplied from such surplus it shall not be lawful for the local authority to charge the parties obtaining the same both with the special water assessment and also for the supply of water obtained by them; but the local authority may either charge the special water assessment leviable on such premises or charge for the supply of water furnished to the same, as they shall think fit."

A great deal was said upon what is contained in the first sub-section, that the Commissioners shall have all the power given by the *Lands Clauses Act* for the purposes described in the sub-section; but the *Lands Clauses Act* would have applied not only to those cases where land was to be bought, but also to cases where land may be used, even for a limited time. An instance of that is the using of a field during the construction of works—that is a power of using a field for a particular purpose. There are a

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Hatherley.

variety of other purposes of that kind for which the *Lands Clauses Act* provides. This clause only says, that where there is something to be compensated for, the compensation is to be such as is given by the *Lands Clauses Consolidation Act*. That is all the first sub-section seems to me to say as to that.

The sub-sections are all independent. The fourth says: "The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works, used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." Now, Mr. *Benjamin* relied greatly upon the words "plentifully supplied with water" as indicating the purpose that it is all to be on a large scale—that the Commissioners are to purchase waterworks for the purpose of meeting the provisions of the Act, and that they could have no reference to a mere well, the water of which is itself supplied apparently in this particular case plentifully without any works being executed for the purpose of giving an additional supply. I think, my Lords, we need not so construe the fourth sub-section as to limit it entirely by those words; and if that be so, the argument fails. If the argument rested on the last words, to be of any use at all it would apply to almost every place and to every sort of work which might be used. For instance, it would apply to a case that was referred to in the course of the argument, the supply of water to *Glasgow* from *Loch Katrine*, because when the works for bringing the water from *Loch Katrine* to *Glasgow* were once executed, it must be a thing within the purview of this particular Act, which applies to places which are "plentifully supplied with water."

All these powers are vested in the local authority—the Commissioners who are to have the power of taking possession of all such wells as are here mentioned—and they are under this clause to be "continued and maintained."

Now, my Lords, what has been done here? All that has been done has been done as a matter of right, whatever amount of damage there may be. What has been done? The Commissioners found a well, a "public well," I must call it, for it had been supplying that portion of the public which resides in *Denny*, which seems to be a populous parish, and they took care that

those rights which were vested in the inhabitants of the parish by long user, whereby they acquired the right of using the water in the way I have described, should be maintained, and that the well itself which supplies that water should be maintained.

That right was vested in the Commissioners. The very object of all these Acts of Parliament passed with regard to local improvement is, that certain matters which were under the direction of an unincorporated body, like a parish, or a burgh which had no existence as a corporation, the rights being vested in persons who cannot protect those rights because they are a large number of individuals, are to be given into the hands of one person or body who is to have the control and the power defined by the Act of Parliament for the maintenance of these wells, and for other objects.

It is provided that all the rights which are in the inhabitants of the district shall be concentrated now in these Commissioners, and they shall have all those rights which could have been exercised by those persons who enjoyed the rights individually, but which they had a difficulty in bringing into full force and effect, owing to their being numerous and to its not being so easy to direct in the case of the whole parish what should properly be done, as would be the case with a single officer.

I do not find that anything more has been done than an exercise of those rights which were formerly vested in the inhabitants to take the water as I have described. That being the case, I have come to the conclusion that the interdict originally granted by the Lord Ordinary was one which ought not to have been granted, because the Commissioners were in their right in exercising the power they did exercise, and that the revocation of that interdict by the Court of Session was right, and that the Commissioners should be freed from any such impediment.

Now there is a question which I believe has really exercised the minds of some of your Lordships, and that is whether or not anything should be done for the purpose of taking care that what I have said I conceive to be the right and power of the Commissioners should not be extended to any claim hereafter to the ownership of the soil, because ownership does not seem to have come fairly into the contest between the parties. I do not find

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Hatherley.

that any issue, either of law or of fact, was ever brought to bear upon ownership. It may be said that on the one side at least it was raised, that is to say, the present Appellant raised the question, he being the owner of the soil on either side. In his pleas in law he seems to say that the Commissioners are, by virtue of his ownership, excluded from the right of doing anything at all on his property. It is possible that the question of *res judicata* may be afterwards raised when a matter is asserted on one side and no issue taken against it on the other, and the parties had a certain bye question which was decided. Under these circumstances, it is said that the Court might at some future time, in considering the nature of the case, possibly think that it was held that the Commissioners had an ownership here. I do not myself feel that very strongly, but I for one do not object, and I think your Lordships would not object, if it were thought necessary, that some reservation of that kind should be made.

Speaking for myself, if I were in the position of the present Appellant, Mr. *Smith*, I should be quite satisfied with the expression of opinion which I believe all your Lordships are ready to concur in, namely, that there was no question whatever intended to be decided or actually decided, either upon the argument before us, or upon the form in which the question arises for decision, which can possibly affect the ownership of the soil. The only question that is decided is, whether or not the power exercised on behalf of the inhabitants by the Commissioners has been rightly and duly exercised. The inhabitants had the power of maintaining this well; and I hold that the Commissioners have the power of maintaining it also; they had a privilege of this description thrown upon them, as a burden involving the doing of what was absolutely necessary for upholding and maintaining that privilege. I do not think that anything more has been attempted to be claimed, or was intended to be asserted by the course which has been taken. Any such addition is therefore, to my mind, unnecessary, but I see no objection to such an addition for the purpose of making it clear what are the conclusions your Lordships come to in this case, and preventing future litigation. For myself I should be contented with simply affirming the interlocutor of the Court of Session, and therefore reversing the inter-

locutor of the Lord Ordinary. However, my Lords, the opinion which I believe your Lordships have unanimously come to upon the main merits of the case, being such as I have given expression to, namely, that we should affirm that interlocutor of the Court of Session, there can be no objection to a day or two being given, if it is desired, for considering whether it is necessary to put any such safeguard as I have suggested, in order to prevent the decision which we have come to from being misunderstood at a future time. I should like to hear what your Lordships have to say upon that subject, as to whether the order of the House shall be *simpliciter* to affirm the decision of the Court of Session, or whether that shall be our order with such an addition or qualification as I have described (1). In either case it is not intended in any respect to vary the costs of the appeal on that account. The appeal itself will be dismissed with costs, with or without such an addition to our order as I have described.

LORD O'HAGAN :—

My Lords, I am clearly of the same opinion, and I shall say a word in the first instance upon the last observations which have fallen from the Lord Advocate. I was not aware that much reliance was intended to be placed upon that view of the 89th section of this statute, and I do not think, with great deference, that the argument in favour of the contention of the Lord Advocate has been very successful. No such question, so far as I can see, was raised in the Court below, and no opinion was judicially given upon it there. Upon the question whether under the 89th section the local Commissioner, or Commissioners, cannot interfere at all unless they take the property into their own hands and become the managers for the public, I really can scarcely conceive that the point is arguable.

The section contains a number of provisions; but it appears to me that, taking it with common sense and clear reason, those provisions are independent of one another, and that the particular sub-section which affects the present case cannot be mixed up with those other sub-sections which have regard to circumstances

(1) See *post*, p. 518.

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord O'Hagan.

in which it is necessary for the Commissioners to be actors. The sub-section in question speaks of all existing public cisterns, public wells, conduits, aqueducts, reservoirs, and so forth—it is not connected at all with any other sub-section, it stands by itself and it fulfils a plainly necessary purpose. It was necessary not only that in certain circumstances the Commissioners should become the actors in working out the machinery for certain purposes, but that in other circumstances they should act merely for the purpose of carrying out what had been going on before. Here they found a public well used by the inhabitants of this particular place liable to obstruction or allowed to be affected by pollution. Clearly there was nothing that they could do with any propriety, but to go to the place and insist that the well should be maintained as it was maintained before.

Now, my Lords, I observe that Lord *Ormidale*, who was the dissentient Judge in the Court below, gives a very clear opinion on the construction to be put upon those words "public well." He says: "In these circumstances I must own my inability to see upon what ground the Respondents could take possession of or interfere with the *Boghead Well* in question in the way they have done. To justify them in doing so it must be shewn, in accordance with the terms of the *Public Health Act*, (1) that the *Boghead Well* is a public well; and (2) that the inhabitants of a defined district have had a right gratuitously to use its water." Those are the two conditions, and in the case before the House those two conditions are abundantly fulfilled. Therefore it appears to me, upon that view of the matter (which would be an exceedingly serious one if we had to consider it as very much to be argued for), that the judgment of the House ought to be for the Respondents.

Now, assuming that that construction of the 89th section is the true construction, what have we as a matter of fact here upon the general question in the case? We have a well used admittedly for seventy years by the inhabitants of a particular village, the village of *Denny*, and the neighbourhood. We have those inhabitants for a period of seventy years maintaining the well at their own expense. We have the well, I believe, sixty years ago lined in a particular way by the inhabitants, and we have it cleaned, cleared of pollution from time to time, and made useful for the

neighbourhood by those inhabitants at their own expense. We have all that, and then we have to consider whether the well which has been so used, so maintained, and so preserved by those inhabitants is a "public well" within the meaning of this Act of Parliament. It appears to me that that is the sole and the simple question to which the whole controversy reduces itself.

Strangely enough indeed almost everything that was argued in the Court below has been abandoned here on the part of the Appellant. I can scarcely perceive, when one goes carefully through the course of contention, that anything remains now that was relied upon strongly in the Court below. In the first place, the learned Judges there had to determine upon a lengthened contention, which resulted in a difference of opinion between themselves, whether or not the inhabitants of a village not constituting a corporation could have and exercise a right like this. But the Lord Advocate comes here and with the greatest propriety admits most frankly and reasonably that that contention cannot be maintained. There was another important question on which the Lord Ordinary gave an elaborate opinion, namely, the question as to whether a servitude was established upon the evidence in this case. Now, the Lord Advocate admits with the greatest frankness and freedom that that argument cannot be maintained; he admits that there was a servitude. And when we come to see what the issue was in the Court below, and what the issue is before your Lordships, we find that the prayer of the Pursuer upon which the judgment of the Court proceeded was a prayer that the people of this particular district of *Denny* should be absolutely deprived of all use of this water, and of the well to which the water belongs. So the adjudication is, and so the interlocutor is upon which this House must now decide. Again, we find that the whole of that line of argument is abandoned, because upon the fullest consideration the learned counsel for the Appellant found that they could not maintain any such view. They admit that the people of this district may have the use of this water just as they have had it for the last seventy years, but they say they are to have it as a servitude. I asked Mr. *Herschell*, on Friday the 5th of March, when he began his argument, what the argument was about; because, looking at the matter practically, it appeared

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord O'Hagan.

to me that on the one side the Lord Advocate concedes everything that the Respondents can demand, and on the other side I do not find that the Respondents demand anything that the Lord Advocate does not concede.

It absolutely reduces itself to the question, if it be a question, in the first place whether a well of this sort was a "public well;" and in the second place if it was a public well what injury has been done? What difference of action has taken place between the use of this well for the last seventy years, and the use that has been made of it recently, or the dealing with it on the part of this local authority? The whole matter is really reduced to that.

On the first of those questions, namely, "Is this a public well," what are the facts? Here is a well used by the public, and used by the public for seventy years, used without contention or opposition by any human being, and used very largely by the inhabitants of the particular district. What is a "public well?" I think it is a well that is used by the public. It appears to me that the 89th section of the Act of Parliament puts upon the words "public well" a construction of its own—for it goes on to say "pumps, wells," and so forth, "used for the gratuitous supply of water to the inhabitants." What is the meaning of a public well except a well that is used by the public, and used gratuitously by the public? In this case the conditions to which Lord *Ormidale* points are completely fulfilled, and therefore in my opinion, this is a public well to all intents and purposes, within the meaning of the Act of Parliament.

A good deal of the very able argument of the Lord Advocate was rested upon the supposition that the claim of the Respondents here was not only a claim to the use of the water in this well, but that a right of property in the well was asserted. Now I do not find that asserted at all—I find nothing asserted on the part of the Respondents except a right to the use of the water. As I said before, in the course of the argument they have put forward their own case, not only in their reasons for resisting this appeal, but also solemnly in the pleas upon which they determined to rely before they came into Court at all. It is worth while to repeat the statement of those pleas, because this really was a very sub-

stantial part of the argument on the part of the Appellant. What they said in those pleas was this:—First. "The operations of the Respondents complained of in connection with the spring of water or well referred to having been completed prior to the presentment of the note of suspension and interdict, the same is incompetent in so far as referring thereto. Second. The said spring of water or well having been used for the gratuitous supply of water to the inhabitants of *Denny*, the Respondents were entitled to protect the same from pollution, and the operations complained of having been executed with that object the complainer is not entitled to interfere therewith," that is to say the well has been used and gratuitously for so long, and therefore, we, the inhabitants, are entitled to maintain it as it has been heretofore. The third of their pleas is this: "The spring of water or well referred to, and the access thereto, having been used by the public from time immemorial, the complainer is not entitled to the interdict sought by him." What is that but saying the same thing over again in other words? There is a well which has been used from time immemorial—we want to have a continuance of the user of that water, we want nothing more and nothing less.

My Lords, if that be so there is an end of that part of the argument. Then we come to the other question, namely, if it be a public well, as I think according to the common understanding of mankind with reference to a language such as ours it must be, if it be a public well, has any damage been done by the Respondents to the Appellant? Now, I conceive in my judgment of the matter that the public authority had no power to transcend the action which would have been legitimate on the part of the householders of *Denny*. I believe that the public officer had no right to do more than would have been within the right of the public whom he represents. Therefore, it is a fair question, and it really remains the only question in the case—and one wonders, when one thinks of it, how a question of that sort should have brought all the people so far away from the northern parts of the island to come before your Lordships' House—what have those commissioners done with the well? Now, when we come to consider the evidence, all that is charged upon them is that they being authorised, as I, for the purpose of my observations at least,

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord O'Hagan.

hold that they were, to keep this public well clear and to preserve it clear from pollution, with all possible facilities for its use by the inhabitants, have actually put a pump beside the well and they have put upon the well a cover of iron. Now, if they were entitled to do anything at all, could they have done anything less than that? The way of using this well which the people of *Denny* had had put in good order as well as they could, was to let down pitchers into it. No doubt it was open to the elements, and it was a perfectly certain thing that pollution would come into it, and what those commissioners who are charged with the public duty did, was to prevent the pollution by covering the well over, not with a cover that is fastened, or a cover that is locked, or a cover that interferes with Mr. *Smith's* perfect access to the well, but with a cover that prevents dirt and filth going into it. And in order to save people the trouble of dipping their pitchers to the bottom of the well (the bottom may sometimes be hard to reach perhaps) they have put up a pump which *ex concessis* cannot interfere with the well in the least degree, beyond enabling the people to take out of it the water that goes into it. It seems to me to be perfectly idle to argue the matter upon that point, which is the only point that remains in the case.

Upon the whole matter, my Lords, it appears to me that the Commissioners have done what they were not only entitled to do, but bound to do under the circumstances, and that they have acted fully within their right and according to the exigency of the Act of Parliament, and therefore the appeal cannot be maintained.

With reference to the form of our adjudication I, for my own part, see no necessity for a special form at all. A certain case was made here by the Appellant which has broken down in all its parts, and the case he originally made was not, according to the concession of his own counsel, maintainable on any ground at all. The demand conceded to him by the Lord Ordinary was a demand to take away from the people of the village of *Denny* the use of a well which they had enjoyed for seventy years. The judgment of the Court below simply says that that interdict shall not go, and I think that this House will not compromise any right or bring any right into question by simply affirming the judgment of the Court of Session in *Scotland*.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

I wish in the first place to look at that which I think is the real substance at the bottom of the whole question between the parties, namely, what was the right of the parties before ever there was any corporation, before the *Public Health Acts* or anything of the sort were passed. It appears that in point of fact there is here a spring rising to the surface a little way from the public highway, at a distance, I believe it is said, of about 170 feet, and to that spring there comes a private occupation-road (I believe) by which persons can in fact come down to the spring. It appears upon the evidence that in the year 1807, for that is the date that it goes back to, the spring had already been cleaned out and protected by walling it with coarse whinstone so as to make it a spring rising inside a well; and it appears that between 1807 and 1811 (an old man is able to fix the date as being between those years because he went out of his apprenticeship in 1811) the old rough whinstones were taken away and the well was walled in and made a spring surrounded by a built-in wall, and that everybody in the neighbourhood used it, that is to say, all the public of *Denny*. Of course people did not come to drink of this well from *Edinburgh* or *Glasgow*, but all the inhabitants of the neighbourhood round it came whenever they liked after that, down this occupation road to the well, and there drew some of the water and carried it away, dipping—that was necessarily the mode of getting the water from such a well as that,—dipping into it their pitchers and carrying away the water to their houses. That seems to have been done as a matter of right from 1807 down to the present day—that is more than seventy years—and it is a reasonable presumption I think from seeing the way in which the well had previously been walled in with whinstone that the habit of so using it had begun much earlier.

Now, my Lords, the first question, which I think is an important one, is, what was the effect of this user? The people who used the water in this way were not a corporation like the corporation of a burgh or anything of that sort—they were the inhabitants of the neighbourhood. It is perfectly known to the law, that there is a right which may be had in water, the

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Blackburn.

right of *aquæ haustus*, the right to get water for the purpose of drinking. Such a right may be given by grant to the owner of a tenement or may be acquired by the owner of a tenement by sufficient user to come and supply himself and the occupants of that tenement with water—that is not disputed at all. Nor is it disputed that where there is a right of that sort attached to a tenement the owner of the servient tenement, the owner of the land where the well is, is not under any obligation to repair the well. But on the other hand, the person who has the right to draw water from the well, has the right to maintain the well and to do what is necessary to keep the well in order and to exercise his right of drawing water from it.

Then came the question, Can that right be acquired by such a fluctuating body as the portion of the public who live in *Denny* and its neighbourhood, they not being incorporated? Could that be done? Apparently at one time—perhaps I may say, at the present time—there seems to have been a good deal of puzzlement about that. Nobody, I think, disputes that every individual cottager, every owner of a cottage in *Denny*, might have acquired that right for himself and his cottage. Nobody, I think, disputes that every individual landowner there might, by means of his tenants, have acquired that right for himself. But as this well is used in substance and in fact by everybody, for everybody goes there, there would be an aggregate of these individual rights. I do not know what the state of the title is there, whether the property all belongs to one landowner, or whether it is divided, as many districts are, into a vast number of small village feus. In that case each would have the right for himself to draw the water, and the aggregate of them would form, in fact, the whole of the inhabitants of the parish, each individual having one right, though occupying, as in were, in fragments, each separately. That is an inconvenient state of things, and one would desire that it should be, as I take it it is in *England*, that such a right as this—a right of *aquæ haustus*—not a right of property, but a right which is well known to the law, of drawing water—not to interfere with the soil, or to carry away the soil, but simply to draw water—that such a right might be enjoyed and acquired by the inhabitants—that is to say, that portion of the public which lives at *Denny*—

without prescribing or calling in the aid of any corporation or burgh, or landowner, or anything of the sort, to establish the right.

Now the authorities seem to have come nearer and nearer to that. It was formerly the case that a burgh might prescribe for the inhabitants of the burgh; and now a *quasi* corporation, such as a burgh of barony, may do it too. But, as I understand it, a burgh of barony, which is called a *quasi* corporation, is not a corporation at all; it is an entity. The Lord Advocate felt pressed by that, and, as I understood him in his argument, he gave up that point altogether. He said: "I cannot deny (at least so I understood him, of course I may have misunderstood him) that this right might be acquired by all the aggregate of small feuars and occupiers of land, each in his own individual right and in respect of his own individual tenement. Nor can I deny that such a right might be claimed by a burgh or a corporation, or even by a *quasi* corporation of a burgh of barony; and, consequently, I feel that I cannot contend in substance and effect that the public of *Denny*—that is to say, the inhabitants of *Denny*, although not a corporation, had not acquired this right as against Mr. *Smith* to come down to the well to drink the water, and for the purpose, and in the exercise, of that servitude to do what was necessary to maintain the well in its proper and ordinary state."

I do not know whether or not it is necessary for the House to decide the question as to the form in which it should be maintained. I certainly should be very unwilling to hold that it was anything other than that which I understood the Lord Advocate not to dispute, and which certainly it would be in *England*, a right of drawing water, *aquæ haustus* (I confine it to that, and I do not extend it to anything beyond), which might be maintained by the public in the district, although it was an undefined district of this kind. It would be more difficult to prove, no doubt, in such a case, but I do not see why it should not exist.

Taking that to be so, I come to the point upon which there seems to have been most hesitation and doubt in the minds of the learned Judges below. Taking that which I have said to be established, we come to the question, What really are the merits?

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Blackburn.

Now what was done was this. The inhabitants of *Denny*, although they were not incorporated for any purpose, adopted the *Public Health Act* of *Scotland*, and, consequently, they got a local authority to the extent to which the local authority might act to represent them. That being the state of things, the local authority took it upon themselves (the question will be whether they were right or wrong) to go to this well, to proceed to build the walls of the well a little higher than they had been before, to clean it out, and to put round it cinders, so that whereas before, people who went to draw water from the well had to put their feet in a puddle, they might now stand upon dry ground. It comes to this, I think, they slightly raised the bank round it, so that whereas the burn in time of spate used to flow in and dirty the water for the time, now the water of the burn should not flow in, and they should be able to get pure water out of the well, whether the burn was in spate or not. All this they did, and all this the inhabitants of *Denny*, when once they had got the servitude, as I have described it, might have done for themselves before the *Public Health Act* came into operation. They went a step farther, they put a cover over the top of it to keep the well cool and dry, and on that they placed a pump to enable the people to pump the water out. Now, I do not see that they did Mr. *Smith* any harm in this. Whether they, strictly speaking, had any right to do it, I do not know. I do not think that question arises now.

But what Mr. *Smith* claimed by his note asking for an interdict or his summons was in substance this, that nobody had a right to come there and draw water at all. He claimed in his summons that they should be interdicted from doing anything to take away the water at all; and he claimed further that all they had done for that purpose should be removed, and that things should be restored to the state they were in before. The Lord Ordinary did not grant him all his prayer (that should be observed); he does not forbid the drawing of water—he seems to have paused upon that and thought it was unnecessary; but he did this, he interdicted the Respondents from "making or erecting pumps" and from "otherwise using, appropriating, or interfering with the said well or spring." And then having done that, having forbidden them

from interfering with the well or spring in that sense, he proceeded to say that what they had already erected they should take away.

Now these two questions arise. First of all, was the thing that was done a thing which Mr. *Smith* had a right to complain of at all, if it was done by the inhabitants? Now on that point, differing from the Lord Ordinary, I think he had not. I think he had no right to complain of or to hinder the inhabitants from coming to the well and drawing water from it. I do not think it matters in the slightest degree to Mr. *Smith* whether they draw the water by a pump or by pitchers. Whether they had a right to cover over the well might be another question if it did any harm; I have known a case where villagers came to draw water from a spring in which there was fish. I have no doubt that there, although the villagers had acquired a right to come and draw water, the laird had a right to the fish, and if this had happened in regard to such a well as that, and if Mr. *Smith* had said, "Your covering over this well with an iron thing will kill my fish," he might have had a ground of complaint. But he does not say that the commissioners do him injury or injustice by covering up the well; he says all along that he wants to prevent people coming to the well at all, so that he may have the full use of his own ground for his private purposes. He does not say, but his counsel say for him, that the commissioners had no right to cover the well. If it does him no harm, although they have done a little more than they are entitled to do, I do not think that they would be bound to alter it; but we need not consider that.

Then comes the next question which has been argued, namely, whether or not the persons who built this, the public authority, had a right to do it. It seems to me that they had. I do not think they had the slightest right beyond what the inhabitants originally had. I do not think the erecting them into a corporation or anything else, derogated in the least degree from Mr. *Smith's* right to the land or to the surplus water, or to fish if there had been fish. But I think this being a well in which the public of *Denny* had rights, and it having become, as I think, a "public well" within the meaning of the 89th section of the Act, I do not think it is necessary to go further than to see what that

H. L. (Sc.) 1880 SMITH v. ARCHIBALD. Lord Blackburn.

89th section does say. The local authority, representing the public of *Denny*, amongst other things have given to them by that section an authority to supply water for the use of that public of *Denny*. There is a proviso put there, that if there is already a water company authorized by Act of Parliament to supply water to that district, whether that water company had supplied it or not does not seem to me to be material, they shall not interfere with their vested rights by supplying water until they have purchased that company's vested rights of water. Then it goes on to say, further, that where there is a "public well" (I pass by all the other words) from which the public have been gratuitously supplied with water, the local authority may (it is one of the purposes to which they may apply their rates) "continue and maintain" that well from which the public have been gratuitously supplied with water. I cannot but think that that applies, and is meant to apply to such a case as this. I do not know whether a public company could without excessive impudence, if there had been a public water company in *Denny*, say that the effect of the *Public Health Act* being introduced had been to take away the right which the public of *Denny* had to draw water from this well, and to force them to come to the company. That would be I think beyond a conceivable case for a company. Even a corporation, which it is said has no conscience, could not do that. What the Act says is, notwithstanding that there may be a company with a vested right to supply the inhabitants, the local authority may, where there is such a well, and where there is such a public right to be gratuitously supplied as I have already mentioned, continue and maintain that well.

Now, has this local board done any more than that? I think not. If I am correct in what I have already stated to your Lordships as being my view of what has taken place, and of what the rights of the public of *Denny* were before the *Public Health Act* was introduced into the place, the Respondents have not done one whit more than the public did before. Consequently, I think the Court of Session were quite right in saying, we will not interdict them from doing what they have a perfect right to do, and we will not order them to take away what they have done, even if

in some trifling degree they may have injured Mr. *Smith*, which I do not think they have.

My Lords, there remains the last question on which, as my noble and learned friend who first addressed your Lordships has said, some doubt has been cast, namely, whether or not if we were simply to affirm the interlocutor it might not be argued hereafter that there was *res judicata* as to some further right which the local authority might have in respect of this as a public well. I think each of your Lordships who have spoken has stated, and certainly I myself positively and distinctly state, that I do not mean to decide anything of the sort. I do not think that the meaning of the *Public Health Act* is that, although this was a public well in the sense which I have described, the public authority has a right to do anything more to it unless they purchase it, as they may purchase any other well, for the purpose of making waterworks. If any sanitary evils came from the well they might stop it up, just as they may any other; but the mere fact that the public of *Denny* had a right to use it before the *Public Health Act* was passed does not give the local authority the right to do anything more than the public had the right to do before. My Lords, looking at all that is asserted on each side on the record, and coupling that with the careful way in which each of your Lordships has guarded the expression of his opinion, I have no fear at all myself lest it should ever be supposed that this was *res judicata*. Nevertheless, if the parties are afraid of it, really I do not know that there will be any great harm in doing what would be, in my view of the matter, quite useless, namely, putting a note to the affirmance of the interlocutor, saying that it is without prejudice to any question such as I have alluded to being mooted hereafter. I think it would require some care and attention to word that properly, because if it were not worded properly the effect of it might be to leave things open which were not meant to be left open. I confess for my own part I should prefer simply to affirm the interlocutor. Upon that I should myself have liked to ask the Lord Advocate if he felt any fear on the part of his client, and if he wanted other words to be added how it should be done. For myself I really do not think it is required.

H. L. (Sc.) 1880 SMITH v. ARCHIBALD.

LORD HATHERLEY:—

My Lords, from what has fallen from your Lordships it appears to me that your Lordships are of opinion that a simple affirmance of the interlocutors of the Second Division of the Court of Session will be quite sufficient without anything more, and that any misunderstanding of this decision will be guarded against by such declarations as have been made by your Lordships. What I threw out before was merely a suggestion with the view of eliciting your Lordships' opinions on this matter. I will move simply that the interlocutors be affirmed, and the appeal dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 8th March, 1880.

Agent for Appellant: *William Robertson.*
Agent for Respondents: *Andrew Beveridge.*

[HOUSE OF LORDS.]

M'DONALD AND ANOTHER . . . . . APPELLANTS;
M'DONALD . . . . . RESPONDENT.

H. L. (Sc.)
1880
March 12.

Entail—Disentail—Value of "Expectancy or Interest" of Second and Third Heirs Substitute—Relevancy of all Facts calculated to affect the Life of the First or Intermediate Heir—Chance of succeeding to the Fee Simple to be calculated—Entail Amendment (Scotland) Act, 1875, *s.* 5, *sub-s.* 2.

The heir in possession of an entailed estate in *Scotland* petitioned under the statutes for disentail. The first heir substitute gave his consent, but the second and third refused. In valuing the interest of the second and third heirs substitute, under the 5th section of the *Entail Amendment* (*Scotland*) *Act*, 1875, the questions arose (1) whether the probable duration of the life of the first heir substitute should be taken from the tables on the basis of his actual age, or whether his actual state of health should be ascertained by inquiry; he refusing to be medically examined, and the second and third heirs alleging that he had suffered from ailments which tended to reduce the probable duration of his life greatly below the average of persons of his age. And (2) whether, there being only one other heir in the entail existing, the second and third heirs' chance of succeeding to the fee simple by surviving all the other heirs of entail should be taken into account:—

Held, reversing the decision of the Court below, (1) that all the facts tending to reduce the first heir's life below the average were relevant and should be taken into consideration; and (2) that the chance of succeeding to the fee simple ought to be valued.

APPEAL from the Second Division of the Court of Session, *Scotland*.

On the 13th of November, 1877, General *Alastair M'Donald*, the Respondent, presented a petition to the Court of Session for authority to record an instrument of disentail of the lands and estates of *Dalchosnie*, *Loch Garry*, and *Kinloch Rannoch*, of which he was the heir of entail in possession. The petition was presented under the powers conferred by 11 & 12 Vict. c. 36; 16 & 17 Vict. c. 94; 31 & 32 Vict. c. 84; and 38 & 39 Vict. c. 61.

The lands in question are held by virtue of a tailzie dated 1837. The nearest heirs of entail being Captain *John Alan M'Donald*, the Respondent's brother, and *Elizabeth M. M'Donald* and *Adriana M'Donald*, his two sisters, who are the Appellants.

H. L. (Sc.) 1880

M'DONALD v. M'DONALD.

There is only one other existing heir in the entail, namely, Miss *Jemima M'Donald.*

It was necessary for the Respondent (*a*) to obtain the consent of the next heir, Captain *M'Donald*, and (*b*) that of the two next heirs, the sisters *Elizabeth* and *Adriana*, or in absence of their consent, that the Court should ascertain the value in money of their expectancy or interest in the entailed estates.

Captain *M'Donald* has consented to the disentail; but the Appellants refusing their consent, it has been necessary to have their interest ascertained.

The Court of Session has by its judgments fixed the interests of the Appellants in the estate at the sums of £973 and £745 respectively, and on the footing that these sums be paid into the bank, have dispensed with the Appellants' consent, and have granted the prayer of the petition.

The questions raised in the appeal are (*a*) whether the Court ought to have directed an inquiry into the prospects of life of Captain *M'Donald*, or whether the Court are right in assuming (as they do) that his life is an average one; and (*b*) whether the value of the Appellants' expectancy or interest in the entailed estate is to be enhanced by the chance of their respectively succeeding to the lands in fee-simple by outliving all the other heirs present and possible. There was also another question raised by the Respondent as to the competency of the appeal, but this was abandoned by his Counsel at the Bar.

The proceedings in the Court of Session were shortly as follows:—

On the 30th of January, 1878, the Lord Ordinary (1), at the instance of the Respondent, remitted the case to Mr. *Sprague*, actuary, to report as to the value of the Appellants' interest in the estate.

He, on the 31st of May, 1878, reported, *inter alia*, as follows:—

The next heir is Captain *John Alan M'Donald*, the only surviving brother and heir presumptive of General *M'Donald*. He was born on the 22nd of March, 1834, and is married, but has no issue. His wife is in good health, and was born on the 28th of June, 1835. It appears from a medical report produced to the actuary, that Captain *M'Donald*, although at present in good health, has suffered from ailments which, in the opinion of the actuary, reduce his prospect

(1) Lord *Adam*.

of life greatly below the average of persons of his age. The actuary has had considerable experience in dealing with proposals for insurance on the lives of persons whose expectation of life is below the average, and having consulted the medical officer of the *Scottish Equitable Life Assurance Society* as to the probable effect of the ailments above referred to, he is of opinion that Captain *M'Donald's* probable duration of life is only equal to about one-half of the expectation of life of healthy persons of his age, and that therefore his real age being forty-four, it is fair and right that he should be assumed in the calculations to be sixty-four years of age. The actuary has, however, at the request of the agent of the Petitioner, made his calculations on the two alternative principles of taking Captain *M'Donald* at his real age and at the advanced age of sixty-four, as above explained. The actuary considers that it may safely be assumed that Captain *M'Donald* will not now have any issue. He has, however, taken into account that, were Captain *M'Donald* to succeed to the estate under the entail, he would be in a position to charge the estate with an annuity to his widow to the extent of one-third of the free rental, and thus materially reduce the income of the next heir.

C. The third heir is Miss *Elizabeth M'Donald*, born the 10th of June, 1827; and *D.* the fourth heir is Miss *Adriana M'Donald*, born the 30th of November, 1828. The actuary considers it may be assumed that neither of these ladies will have issue. *E.* the only other existing heir under the entail is stated to be Miss *Jemima M'Donald*, who was born on the 16th of June, 1832. It may be assumed that this lady also will leave no issue, even were she now to marry.

The actuary understands that he is to value the expectancies of Miss *Elizabeth M'Donald* and Miss *Adriana M'Donald* as at the 14th of November, 1877, being the date of the first interlocutor in the petition, and he considers that the ages of the several heirs to be employed in the calculations should be those at the birthday, whether last or next, which is nearest to the said 14th of November, 1877. These ages will therefore be—

A. General *M'Donald*, forty-eight. *B.* Captain *M'Donald*, forty-four (but taken as sixty-four). (Mrs. *M'Donald*, his wife, forty-two.) *C.* Miss *E. M'Donald*, fifty. *D.* Miss *A. M'Donald*, forty-nine. *E.* Miss *Jemima M'Donald*, forty-five. The expectancies of *C.* (Miss *M'Donald*), and *D.* (Miss *Adriana M'Donald*), the second and third expectant heirs, of which the actuary is to estimate the value, consist each of two parts. The first part is the chance of the heir surviving the previous heirs in the entail, and enjoying the rental for her life; and the second is the chance of the heir acquiring the fee-simple of the estate by surviving all the other heirs in the entail. For the calculation of the value of the first chance it is only material to have information as to the heirs before them in the entail; but the value of the second chance depends very much upon the number and ages of the heirs who succeed them under the entail; and the actual selling value of the estate as a fee-simple property is obviously a very important element in the calculation of the value of this second chance.

Before the actuary had been furnished with any information as to the existing heirs who succeed *C.* and *D.* in the entail, he had calculated the values of their interests in the estate simply as the values of their respective life interests in the income, expectant on the decease of the preceding heirs; but after ascertaining that there was only one other existing heir in the entail, namely, *E*, he became

H. L. (Sc.) 1880 M'DONALD v. M'DONALD.

satisfied that the value of the chance of either *C.* or *D.* succeeding to the fee-simple of the estate by surviving all the other heirs, must be considerable; and on making his calculations on a fresh basis, so as to allow for this chance, he found that the resulting value was more than double that previously obtained.

The results of the actuary's calculations, in which due allowance has been made for all the before-mentioned circumstances, are as follows:—

Post 531

Taking Captain *M'Donald* at the age of sixty-four, and disregarding the £5000 of improvement outlay as a charge against the estate, the actuary finds that the sum to be paid by General *M'Donald* to his sisters, Miss *M'Donald* and Miss *Adriana M'Donald*, should be £9114

And if the £5000 is allowed £8122

Divisible thus:—

1. To Miss *M'Donald*	£5140	or £4564
2. To Miss *Adriana M'Donald*	3974	or 3558
	£9114	or £8122

Taking Captain *M'Donald* at his real age of forty-four, the sum to be paid by General *M'Donald* to his sisters should be £5724

And if the £5000 is allowed £5114

Divisible thus:—

1. To Miss *M'Donald*	£3141	or £2799
2. To Miss *Adriana M'Donald*	2583	or 2315
	£5724	or £5114

The Respondent objected to this report in respect, *inter alia*, that the actuary had greatly over estimated the number of years which should in his calculation be added to Captain *M'Donald's* age; and (2) in respect the actuary had estimated the chance of the Appellants "acquiring the fee-simple of the estate by surviving all the other heirs in the entail." The Appellants also lodged objections, but these were not material to the points here.

The Lord Ordinary (1) substantially sustained the report. A reclaiming note was taken by the Respondent to the Second Division, and it having been mentioned that Captain *M'Donald* was willing to be medically examined, their Lordships, on the 16th of January, 1879 (Lord *Gifford* dissenting), found that the chances of Captain *M'Donald's* life ought in respect of Captain *M'Donald's* consent, to be ascertained in the ordinary way by such professional

(1) Lord *Adam*.

examination and report as the Lord Ordinary may direct. And on the second question their Lordships sustained the objections for the Respondent, that the chance of acquiring the fee-simple ought not to be taken into account (1).

After some further proceedings it turned out that Captain *M'Donald*, who resided near *Liverpool*, declined to be examined except on the condition that the examiner bring an autograph letter of authority from General *M'Donald*, the Respondent and Petitioner. This letter General *M'Donald* declined to write, and the Lord Ordinary having verbally reported the case to the Second Division, their Lordships, on the 19th of March, 1879, remitted to the Lord Ordinary to proceed with the cause, on the footing that Captain *M'Donald's* life was to be assumed to be an average life, and to be estimated according to his present age (2).

A further report was prepared for the purpose of carrying out the above judgments of the 16th of January and the 19th of March, and the Reporter ultimately found the value of the Appellants' interest and expectancy to be respectively £973 and £745.

The Lord Ordinary, on the 27th of May, 1879, ordered these sums to be paid into the *British Linen Company's* bank in the names of the Appellants. This having been done, his Lordship on the 31st of May following dispensed with the consent of the Appellants, and approved of the instrument of disentail.

The Appellants lodged a reclaiming note against these interlocutors; but the Second Division, on the 7th of June, 1879, refused the note, and adhered to the interlocutors (3).

Hence the present appeal. Objection was taken by the Respondent to the competency of the appeal; and the appeal committee directed that the objection should be discussed along with the merits; but when the case came to be argued at the Bar this objection to the appeal was abandoned.

Feb. 10, 12. Mr. *Benjamin*, Q.C., and Mr. *J. P. B. Robertson* (of the Scotch Bar), contended for the Appellants that previous to

(1) Court Sess. Cas. 4th Series, vol. vi. p. 521.
(2) Ibid. p. 869.
(3) Ibid. p. 1011.

H. L. (Sc.) 1880 M'DONALD v. M'DONALD.

the statute of 1875 (*The Entail Amendment (Scotland) Act*, s. 5, sub-s. 2), it was impossible to have the estate disentailed without the consent of the second and third heirs substitute: 11 & 12 Vict. c. 36, s. 3, and 16 & 17 Vict. c. 94, s. 4. But now if these heirs refused their consent to the disentail, their consent may be dispensed with; and the Court is to ascertain the value in money of their expectancy or interest in the entailed estate. The Appellants were therefore in the position of parties possessed of valuable rights, of which the Legislature allowed them to be divested by compulsory sale. This was only to be done if, and when, the value of their rights can be definitely appraised in money. Ascertaining this value could not be done, without finding out when in all probability the preceding life interest—that here of Captain *M'Donald*—would expire. That period depended as much upon health as age, when health is such as to render life abnormally precarious. Here the inference arising from age was nullified by the fact certified by the reporter, that Captain *M'Donald's* life owing to his health was not an average one, therefore the Court below were not wrong in proceeding upon age alone. The Respondent avers that the first heir's life is an average one; but the Appellants offer to prove the contrary. The Court below say that as he refused to be examined, the evidence as to his state of health must not be gone into; yet that evidence was of the strongest kind that the average value of his life has been disturbed by special facts, viz., that he has been in a bad state of health for many years; that he suffered from an epileptic fit so late as 1877; and that his life was more than once despaired of. These were facts which surely required inquiry into. If the Respondent maintained that Captain *M'Donald's* prospects of life could only be ascertained by medical examination, and that he cannot be so examined, then the Respondent could not fulfil the condition under which the privilege of disentail is conceded; and he must continue to hold the estate under the entail.

On the other hand it might be expedient that a man's health should not be the subject of evidence judicially taken; nor did they contend there was any power in the Court below to compel a person to be medically examined in a case where he had no interest; but the property of the Appellants ought not to be

taken from them without their will for less value than it is worth; and the ordinary rule of law was that questions of fact must, failing other modes, be determined upon evidence. If recognised tables were the sole thing to look at, nothing could have been easier than for the Act of 1875 to say the value is to be ascertained according to the tables scheduled to the statute for succession duty. But the Legislature did not do that. Therefore there was nothing here to prevent the Court allowing the parties to adduce evidence on one side and the other, concerning all the facts of Captain *M'Donald's* life, with the object of finding whether those facts have made his life more precarious or not.

Then on the second question, whether the Appellants' chance of succeeding to the fee simple ought to have been taken into account and valued; they maintained that it ought: for there was only one other substitute heir in existence after the Appellants, and therefore whosoever of the existing heirs—under the deed of entail here—should longest survive, would be entitled to hold as a fee simple proprietor. From the relative circumstances of the existing heirs substitute in this case, it happened that the Appellants have each a highly appreciable chance of obtaining the fee simple, and therefore their interest is much more valuable than if they had not that chance. And the value of the chance of succeeding had been considered and allowed in the recent case of *De Virte* v. *Wilson*, Dec. 19, 1877 (1); see also *Erskine*, 3. 18. 32. Also the actuary, realizing the importance of this element in the inquiry remitted to him, appraised it highly in his calculation, and his views were affirmed by the Lord Ordinary.

Mr. *Horace Davey*, Q.C., and Mr. *J. B. Balfour*, of the Scotch Bar (with them Mr. *J. M. Collyer*), maintained, for the Respondent, what the Act of 1875 enacts is, that the value should be ascertained, that is that something should be ascertained, according to ordinary and well-known methods. The Appellants want to find out how long Captain *M'Donald* has to live; but nothing was so uncertain as human life, and therefore the result of such an inquiry would be a mere guess. An average life meant a life based on the calculations of all sorts of lives, and included

(1) Court Sess. Cas. 4th Series, vol. v. p. 328.

H. L. (Sc.) 1880 M'DONALD v. M'DONALD.

those which are not fairly good lives, for that reason the question of Captain *M'Donald's* prospect of life should be referred to recognised tables: see *Rowley* v. *London and North Western Railway Company* (1). An inquiry such as that sought for by the Appellants was not warranted by the statute of 1875, and no machinery was provided for it. If it was allowed, the position of heirs of entail in possession would be affected much for the worse, and the statute of 1875, which was intended to make the process of disentail more easy, more summary, and not more expensive, would entirely fail in this respect. If proof were to be admitted that the interposed life was less than the average prospect of survivance, consistency would require—if the Respondent averred that he had more than the average prospect—that this should also be inquired into; and so, also, if the lives of the two next heirs, the Appellants, or either of them, were alleged to be beneath or above the average. These difficulties would be met by the consideration that there might be extreme cases in which the Court might see fit to modify the procedure. It was easy to figure cases, such as that where the person whose life is in question is *in articulo mortis*, where the Court would deem it right to interpose. However, the present was not such a case, for the actuary had reported in June, 1878, that Captain *M'Donald* "is at present in good health," and, as observed by Lord *Gifford*, "he is not at present labouring under any known or ascertainable disease, and he has sustained no injury from which there is to be dreaded in any reasonable sense a mortal or fatal result." Then if the medical examination of Captain *M'Donald* cannot be demanded, though he is in *England*, the best evidence cannot be made available; and the Respondent knew of no rule of evidence by which in such a case secondary evidence of the facts would be admitted. Then the Appellants' averments related to facts in Captain *M'Donald's* past life and habits, and to make a complete inquiry into such averments a proof at large ought to be allowed; but where was such an inquiry to stop? Not only Captain *M'Donald's* past history, but that of the Appellants and General *M'Donald* must also be investigated. They, therefore, submitted that even if the inquiry sought was competent, or

(1) Law Rep. 8 Ex. 221.

within the discretion of the Court, it was inexpedient, and no certain result would be obtained.

On the second question they maintained that, having regard to the statute of 1875, and to the legal position of an heir of entail in possession, the chance of an heir substitute acquiring the entailed estate in fee simple by outliving all the other heirs, was not an element to be taken into account in calculating the value of the expectancy or interest of such heir substitute. Under the statute of 1875 the persons to be settled with are the heirs substitute of entail, and in that character alone do they receive the value of their expectancy; and in the same character was their consent required under the former law. That is, the Court is to value the expectancy of the heir substitute of entail succeeding to the entailed estates as such, but with reference to an application which will result in the heir in possession holding the estate in fee simple. A fee simple estate would be taken by the substitute, not by virtue of the entail, but by the law apart from the entail; and they have this chance unimpaired even after the disentail; and therefore it was not a chance or value of which the statutes in respect of disentails take any account. And according to the well-established principle of Scotch law the heir of entail in possession is in the position of fiar, or absolute proprietor, except only in so far as he is fettered by the deed of entail: and the intention of the Legislature was to give him an estate unfettered, provided he should first satisfy the expectancies of a limited number of the heirs substitute as regards their interest in the entailed estate. It did not intend the fiar to pay for the fee simple,—for it regarded that as being in the person of the heir of entail in possession,—but for an entailed or fettered estate.

De Virte v. *Wilson* (1) was a decision going thus far, that the value of the "expectancy or interest" under the Act of 1875 was a different thing, and depended on different considerations, from the value of consents, while consents were voluntary; and the Court below further held that the surplus value of the estate, if any, beyond the value of the interests of the four heirs, regarded as life interests, accrued wholly to the heir in possession in virtue of

(1) Court Sess. Cas. 4th Series, vol. v. p. 328.

H. L. (Sc.) 1880 M'DONALD v. M'DONALD.

his being, in contemplation of law, not a life-renter but proprietor, although subject to fetters.

It was true that in that case allowance was made in respect of the power which each heir substitute had of disentailing the estate when he came to succeed under the entail. But they denied that that decision, if it conflicted with the principles for which they contended, was correct. On the above grounds they submitted that the Appellants' chance of succeeding to the fee simple should be disregarded altogether.

Mr. *Benjamin*, Q.C., in reply.

The Law Peers having taken time to consider their judgments delivered the following opinions:—

EARL CAIRNS, L.C.:—

My Lords, the Respondent, General *M'Donald*, is heir of entail in possession of certain estates in *Perthshire*, held under a tailzie dated 1837. The nearest heirs of entail entitled to succeed to the estates after the Respondent are his brother, Captain *M'Donald*, and his sisters, the two Appellants.

The Respondent has applied to the Court of Session for authority to disentail these estates. He has obtained the consent of Captain *M'Donald*, the next heir of entail, and as the Appellants, the second and third heirs of entail, do not consent, it is necessary, under the *Entail Amendment* (*Scotland*) *Act*, 1875, that the value in money of their expectancy or interest in the entailed estate should be ascertained to the satisfaction of the Court, and paid to or secured for them.

The Court has valued the interest of the first Appellant at £973, and of the second at £745, and upon these sums being paid into the bank, has dispensed with the consent of the Appellants and approved of an instrument of disentail.

The question is, whether the expectancy or interest of the Appellants has been valued on correct principles.

Your Lordships are aware that under the *Rutherfurd Act* a Scotch entail created before 1848 could not be broken or opened without the consent of the three nearest heirs of entail; so that if the Act of 1875 had not passed the consents of Captain *M'Donald*

and the Appellants would have been necessary, and the dissent of any one of the three would have prevented the disentail.

The first question as to value relates to the life of Captain *M'Donald*. He was born in 1834, and is married, but has no issue. The Appellants offer to prove that Captain *M'Donald*, though at present in good health, has suffered from ailments which reduce his prospect of life greatly below the average of persons of his age. The Respondent, on the other hand, contends that Captain *M'Donald's* life should be taken as an average one, according to proper life tables, and this has been the opinion of the majority of the learned Judges.

I am sorry that I cannot concur in this opinion. It might have been a convenient and reasonable course for the Legislature to have laid down some rule by which these expectancies or interests should be valued, and the Legislature might have said that in all cases the probable duration of life should be calculated according to some of the well-known tables, but it has not done so. In that state of things it appears to me that the Appellants have a right to bring before the Court, or before any actuary or valuer to whom the case is referred, any facts relevant to the probable duration of Captain *M'Donald's* life; and his state of health, and the ailments from which he has suffered, if calculated to shorten life, must be relevant to such an issue. I see no inconvenience in this course to the Respondent. The onus of proof will be upon the Appellants. The Respondent will prove the age of Captain *M'Donald*, and the probable duration of an average life at that age; and it will be for the Appellants to prove that Captain *M'Donald's* is not an average life, and why.

The other point in dispute arises in this way: A younger sister of the Appellants, *Jemima M'Donald*, is the fourth heir of entail, and she is now the last in the entail. If she should be dead without issue when the Appellant *Adriana*, the third heir of entail, succeeds, if she does succeed, then *Adriana* will be absolutely entitled to the fee of the estates, whereas if *Jemima* or any of her issue are in existence at that time, *Adriana* will be virtually no more than a life-renter, unless she obtains the consent of *Jemima* or her issue to disentail. The same would be the case as to the Appellant *Elizabeth* if she were to survive *Adriana*.

H. L. (Sc.)
1880
M'Donald
v.
M'Donald.
Earl Cairns, L.C.

It is contended by the Appellants that in valuing the interests of *Elizabeth* and *Adriana* their interests should not be treated as those of life-renters only, but the possibility should be taken into account that when the survivor of them comes into possession *Jemima* may be dead without issue.

The Court of Session were of opinion that this was not an element of value which ought to be considered. My Lords, I am unable to concur in that view. The question I think to be asked is this: supposing the Act of 1875 had not passed what would have been the interest which the Appellants would have enjoyed in specie, supposing they had refused their consent to disentail. It cannot be doubted that what the surviving Appellant would have enjoyed would have been an interest equal to a life-rent, or equal to a fee, just according as *Jemima* was or was not at the time dead without issue. This is the amount of interest that would have been enjoyed in specie, and this, as it appears to me, is the interest that must be valued. If a Scotch estate was entailed on *A.*, a bachelor of seventy, then on *B.*, a spinster of seventy, then on *C.*, a spinster of seventy-five, and an Act of Parliament required "*the expectancy or interest of B. in the entailed estate*" to be valued, I cannot doubt that the valuer must have taken into account that when *B.* succeeded, *C.* might be dead, and the estate of *B.* an unshackled fee. The valuation in the case before your Lordships may, and probably will, be a matter of difficulty, depending as it does on contingencies not merely of death but of marriage and of having issue; but this is the task which the Legislature has assigned to the Court, and however difficult it may be it must, in my opinion, be discharged.

My Lords, I think the interlocutors under appeal should be altered, but I have felt much doubt as to the form in which the alteration ought to be made. The case is one in which the interposition of any delay may lead to serious alteration by death or otherwise in the rights of the parties, and on the other hand it may be that the Respondent will not desire to disentail if he has to pay a larger sum for consents than the sums already approved by the Court. The actuary to whom the question of valuation was referred by the Court, at a time when he took into account the elements which I think ought to enter into the calculations,

put the value of the interest of the Appellants at £9114 (1), if I rightly understand the figures, and I understood at your Lordships' Bar the counsel for the Appellants to say that if this sum were secured they would be willing to consent to the immediate disentail, the inquiry into the exact value taking place afterwards. If, therefore, your Lordships concur with me as to the principle of the valuation, I should propose a motion in this form: The Appellants consenting to an immediate disentail of the estates in question on the terms of the Respondent paying within twenty-one days into the *British Linen Company's* bank the sum of £9114 as a security to answer the valuation hereinafter directed to be made, declare that, in the event of such payment being made within the time aforesaid, the interlocutors of the 31st of May, 1879, and the 7th of June, 1879, so far as they approve of the instrument of disentail, No. 22 of Process, and interpone authority thereto, and grant warrant for recording same in the Register of Entails be affirmed, and in that event refer it to the Court of Session to ascertain anew the value in money as at the date of the instrument of disentail of the expectancy or interest of the Appellants in the estates within the meaning of the *Entail Amendment* (*Scotland*) *Act*, 1875. In the event of payment of the said sum of £9114 not being made within the time aforesaid, reverse the interlocutors appealed from *simpliciter*. In either case the Respondent to pay to the Appellants the costs of this appeal.

If I am wrong in the figures which I have used (£9114) the parties will correct me; and I wish also to add that I have taken these figures merely because they were given by the actuary, and not as adopting either the mode or the result of his calculation, which the Court may see fit on the new inquiry not to adhere to. The sum arrived at by the actuary certainly appears to be, under the circumstances, a very large one.

LORD HATHERLEY:—

My Lords, two points, each of them of considerable importance, have arisen in this case which comes before us upon an appeal from a decision of the Court of Session in *Scotland* in proceedings which were taken there under the Act commonly called the

(1) See ~~*post*~~, p. 522.

H. L. (Sc.) 1880 M'Donald v. M'Donald. Lord Hatherley.

Rutherfurd Act, and the subsequent amending Act of 1875 as to the disentailing of estates in *Scotland*. I shall not enter at length into the nature and effect of those two Acts, but I will proceed at once to consider the questions which have been raised in this appeal.

The estate in question is subject to an entail created by Major-General *M'Donald*. The General is in possession by virtue of that entail, and the three next in succession to him are his brother, Captain *M'Donald* (the nearest heir), his sister *Elizabeth Moore Menzies M'Donald*, and his sister *Adriana M'Donald*. These two ladies not having consented (Captain *M'Donald* has) to a disentailing of the estate in question, it became necessary to ascertain under the Act of 1875 the value in money of their expectancy or interest in the entailed estate with reference to the application of General *M'Donald*. In making this valuation it became necessary to value also the interest of the first heir next to the heir in possession, that is, the interest of Captain *M'Donald*. The first of the two questions I have referred to is, Whether in valuing the life of Captain *M'Donald*, who was the first heir next to the heir in possession, the actuary should value it simply according to the tables which are used by actuaries for estimating contingencies of this character as an expectation of life simply measured by the age of the subject, or whether the state of health and other matters affecting life should also be taken into consideration in arriving at the value. I think that it is impossible to exclude evidence strictly applicable to the particular circumstances of the case and tending directly to affect the probable duration of life from such an inquiry as the Act of 1875 prescribes. Many cases may occur or may be suggested in which it is all but certain that the ordinary expectation of life of a man of a given age would not represent the probable value of the life of a selected individual. The table averages were in fact at first deduced from the total number of men of a given age in all possible states of health and any one life which is selected may be the lowest of the class as regards health. I think it is right to admit the evidence of the calculated tables applying to any given age as *primâ facie* proof, but it should be open to the other side to lead proof of facts manifestly affecting the alleged average in the particular case.

For instance, take the case of a man known to be on his death-bed with consumption; the value of the expectation of life, according to the tables, would not at all represent the true value in that particular case. If you take at the average value any one life out of a class upon which the average is taken, and disregard the circumstances affecting that individual, the effect may be to arrive at a valuation in some cases far above and in other cases far below the actual value of that particular life. I do not see how under the words of the Act an inquiry into facts manifestly affecting the alleged average in the particular case can be shut out.

The second point which has arisen has occasioned me much more doubt and hesitation than the first point; it is this: The first three heirs being the captain and his two sisters, the fourth heir in the entail is another sister named *Jemima*. According to the Act of 1875 her interest is not to be taken into account; but if she should die without issue in the lifetime of either of her sisters, then the sister on coming into possession as heir of entail will be entitled to deal with the fee simple free from the fetters of the entail. Should this interest be valued as part of the interest of either of those sisters under the directions of the Act of 1875, namely, as "an interest or expectancy in the entailed estate" with reference to this disentailing application?

I have had the opportunity of seeing the opinions of your Lordships, who, with me, heard this matter argued, and I have read with great attention the opinions of the Judges in the Court below, and I have, though with much doubt, come to the conclusion that the view contended for by the Appellants is right. As I read the two disentailing Acts of Parliament, they seem to have proceeded on the principle that the long periods of entail sanctioned by previous legislation and by the previous state of the law ought to be abridged, but at the same time, that such abridgment should take place with a due regard for vested interests, in so far as they would not frustrate the purpose of the Act itself, namely, the intended earlier release of entailed estates from the fetters which virtually excluded them from commerce. In the *Rutherfurd Act* a system of consents was established by which the heir in possession might acquire the unfettered dominion. These

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Hatherley.

consents were to be the consents of the first three substituted heirs in succession after the heir in possession. This Act, however, gave no control to the heirs beyond three which could prevent the disentailing of the property. The Act of 1875 modified this arrangement by directing that the immediate heir next to the owner in possession must give his consent, or else the disentailing instrument should not be allowed, but that the next two heirs, if they would not, or from disability could not, consent, should be bound by a deed approved of by the Court, provided that the Court satisfied itself of the value of the expectancy (in the words I have mentioned) and that such value was secured to the satisfaction of the Court. This being done, the fourth and subsequent successive heirs were barred by the allowance of the deed. The effect of this enactment was to disregard altogether the interests more distant than that of the third heir in expectancy.

The question now before your Lordships is of a somewhat singular character, regard being had to the circumstances, namely, whether an interest which arises in the third heir, only in consequence of the interest of the fourth heir and subsequent heirs being exhausted, namely, the chance of the fourth heir dying before the third heir and without issue, should be valued? Suppose the fourth heir to be the last, so that there is no heir beyond the fourth who could insist on the fetters imposed on the estate being brought into effect when it comes to the third heir, the question is whether this is an interest or expectancy directed to be valued by the Act of 1875. Is it an "interest or expectancy in the entailed estate?"

The Legislature, in its desire to achieve the object it had in view, namely, the liberation of estates subject to entail, has nevertheless, both in the *Rutherfurd Act* and in the Act of 1875, intimated the extent to which it thought justice required consent in the one case, and compensation in the other in respect of vested interests, stopping at such a degree of interest as any third substitute heir could acquire by the entail, or, as it is expressed in the Act, "in the entailed estate." It appears to me probable that what the Legislature was aiming at was the entailed estate only as created by the deed of entail, and the interest now in question is an interest which is beyond the entail, and indeed,

after the interest in the estate tail has passed into the second or third heir and is only arrested at the decease of the third heir by the fact of the next or fourth heir or his issue not being in existence to receive it, and that the interest which the third heir may acquire and dispose of by reason of the termination of the estate tail taking place immediately on the death of *Jemima* (the fourth heir substitute) without issue, is the original fee simple which has been allowed to remain fettered so far as to carry it in its fettered state to the third heir in succession, but which became free from the fetters when it had reached the third heir, who founds her claim not as interested in the entail but as the unfettered fiar and mistress of the estate from the failure of the entail.

We have the singular result of an interest in the third heir which is to be valued under the Act of 1875, and which results from the failure, not of prior but of subsequent limitations to the fourth heir, which would not be the subject of any compensation if vested in that heir herself. I feel great difficulty in coming to such a conclusion. The only case cited before us is that of *De Virte* v. *Wilson* (1), which certainly seems to have proceeded on some such view, but we have in the present case the opinions of the majority of the Judges in the Court below in favour of that view, and I feel the words of the Act—"expectancy or interest in the entailed estate"—very strong, and though I should, from the nature and purport of the two Acts of Parliament, be led to the conclusion that so extended a meaning ought not to be given to them; yet the words used would be sufficient to include all the interest in the estate coming to her by the results of the entail and taken from her by the Act.

I have had to consider what from the nature and the purport of these two Acts of Parliament would be the reasonable and probable construction of the words I have referred to, and I do feel strongly that the nature and intent of the Acts of Parliament are so very clear that I should have expected to find a different legislative enactment when we come to the enacting part on which this particular question arises. At the same time I cannot say that I find words in the Act that would support the meaning which some of the learned Judges in the Court below thought the words I have

(1) Court of Sess. Cas. 4th Series, vol. v. p. 328.

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Hatherley.

referred to would bear. If I came to the other conclusion I should have to do so upon a very forced construction, because although it is not the entail itself which causes this reversionary interest, as we should call it in *England*, to fall into possession, still it is in consequence of the reversionary interest that the estate tail cannot be barred, for the Court is not authorized to allow it to be barred, except upon the condition of having the whole "interest or expectancy" of the person against whom they allow it, valued according to the position which he or she may occupy at the time when the disentailing deed is proposed to be executed. Any changes which may have taken place, must have all proceeded from the effect of this disentailing deed, and it is owing to the effect of the disentailing deed, that this lady acquires her interest in the estate. I think this interest in the estate is part of the "interest or expectancy in the entailed estate" directed to be valued.

Therefore, it appears to me that we must hold, as my noble and learned friend on the woolsack has proposed, that the decision of the Court below as to the valuation of this interest was erroneous in so far as it omitted the valuation of this particular interest, which appears to be not only a substantial interest but one of very considerable value and importance. Moreover, this is a question of principle, and one probably of not very infrequent occurrence; therefore it is well to settle it at once by a decision of your Lordships' House upon the subject. I agree therefore in the order which my noble and learned friend the Lord Chancellor has suggested to your Lordships. I think that the right time for the valuation to begin is the date of the execution of the deed, because as soon as the deed is executed it takes its full effect upon the conditions being complied with. It will not take its full effect until certain conditions have been complied with, but when they have been complied with it will immediately take its full effect, and its full effect will begin from the date of the execution of the instrument itself. Subject to the figures being correct, as to which I am not prepared to express a clear opinion, I think that the proposed order is right. As regards the costs of the appeal, the Appellants having succeeded in the case they have brought to your Lordships' Bar, must have their costs. According to the common rule, the unsuccessful party must bear the costs of the appeal.

LORD BLACKBURN:—

My Lords, the Respondent is heir of entail in possession of an estate held by virtue of a tailzie dated prior to the 1st of August, 1848. Before the 11 & 12 Vict. c. 36, commonly called the *Rutherfurd Act*, lands might in *Scotland* be fettered in perpetuity. That Act was passed on a preamble reciting that "the law of entail in *Scotland* has been found to be attended with serious evils, both to the heirs of entail and to the community at large."

The first section provided that entails made by deeds of tailzie dated after the 1st of August, 1848, might be barred by an heir in possession, whenever that heir was born after the date of the entail and being of the age of twenty-five, or when he could obtain the consent of an heir apparent born after that date and of that age; and the second section gave a precisely similar power as regarded entails made by deeds of tailzie before that date when the heir in possession or heir apparent was born after the 1st of August, 1848. But if this had been all that was done, the evils arising from so large a portion of land in *Scotland* being already under the fetters of tailzies would have continued till the 2nd of August, 1873, when first it became possible that an heir of the full age of twenty-five born after the 1st of August, 1848, could exist.

From that time the estates bound by the fetters of entail made before the 1st of August, 1848, would continually diminish in number as heirs either in possession or heirs apparent born after the 1st of August, 1878, attained the age of twenty-five. Such entails would not necessarily come to an end till the lapse of a lifetime from that date, though the number remaining sixty years after 1848 would probably be very few. It was thought proper to make provision for an earlier unfettering of such estates; and by the 3rd section it was provided that an heir of entail in possession under such a tailzie might disentail, if he could obtain the consents of the three nearest heirs who at the dates of such consents were for the time entitled to succeed to such estate; and by sect. 31 the Court of Session might appoint a guardian to any such heir under incapacity, who should be entitled, "with or without consideration," to consent for that heir.

I think the object of the Legislature was to enable the lands to be disentailed, but to give each of the three first heirs an un-

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Blackburn.

fettered discretion as to whether they would protect the entail or not, and to allow him to bargain as he pleased with the heir in possession. Such an heir may, and I believe often does, refuse his assent, from a belief that he ought not to disturb the provisions of the person from whom he derives his interest in the estate, or because he thinks it more for the interest of the family to preserve the entail. When no such motives for refusing consent existed an heir probably sometimes drove an extortionate bargain. But the heirs whose consent was asked for often, and I suppose the guardians of an infant heir on his behalf, usually said that they required to be paid the fair value of their consent, but would not ask more; and, consequently, actuaries were often asked to put a value on such consent, depending, as it necessarily did, in a great degree on the probabilities of the duration of life, marriage, and issue. No such valuation, however, could in any way be brought under the review of a Court.

I do not think it necessary to say more about the *Rutherfurd Act*, the provisions of which are in this case only material in as far as they aid in construing the Act of 1875 which amended that Act, and must be construed along with it. The terms of that Act must be fully in the minds of your Lordships, and I need not read them. I think the object of the Legislature must have been to give further facilities for freeing lands entailed from the fetters imposed on them by entails prior to 1848. Those lands are yearly diminishing in number, as heirs born after 1848 become either heirs in possession or heirs apparent. But it seems to have been thought that the process by which such lands were unfettered was too slow. The age at which an heir in possession or apparent could consent was reduced to twenty-one, and the nearest heir alone was left in the position of having an absolute right to forbid the disentailing; and the Court of Session was empowered to dispense with the consent of the second or the third heir, but a condition precedent was attached to the exercise of this power. The Court is required "to ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application (*i.e.*, the application of the heir in possession to disentail the estate) of such heir refusing to consent." It is on the true construction of this provision that this case depends.

The Appellants have only raised two points as to the mode in which the valuation has in this case been taken in such a way as to bring them before this House. If in both of those the Court of Session is right, the valuation (whether objectionable on other grounds or not) stands good, and the appeal must be dismissed. But if in both or either of these points the Court of Session has in the opinion of this House gone wrong, the valuation as made is not right. And, as I think, though the Court of Session are to decide summarily, they are to decide judicially, and any error in principle will prevent the valuation from standing; and so, if both or either is wrong, it will fall to be considered what is to be done. I cannot pronounce judicially on any point except those two brought before this House, and I wish to avoid expressing any opinion on such points except in so far as it is necessary to consider them with a view to disposing of those two points.

The Legislature has cast on the Court of Session the task of "ascertaining the value," and when it is "ascertained to the satisfaction of the Court," tells them what to do. But the Legislature has given no directions at all as to how or in what manner the Court is to ascertain the value. In the *Succession Act* (16 & 17 Vict. c. 51, s. 21), it is directed that interests during periods depending on lives shall be estimated according to the value given in certain tables annexed to that Act, so as to leave nothing to be ascertained except the age of the parties. Nothing of the sort is done in this Act.

But I think the Legislature knew that the value of an expectancy must, in a great degree at least, depend on the probabilities of the duration of life, the chances of marriage, and the chances of such marriages proving fruitful. They must, I think, have known that actuaries had tables, founded on extensive experience, on which they acted, which enabled them to value with considerable accuracy the probabilities of life; and that though the experience on which calculations as to the probabilities of marriage and issue were based was much narrower, and the results more subject to uncertainty, yet that some calculation could be made in that way and none could be made in any other. I think therefore that the Legislature must have contemplated that the Court would call in the assistance of an

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Blackburn.

actuary to report to them on all those matters which properly come within the province of an actuary. Such was the course taken in *De Virte* v. *Wilson* (1), the only other case in which as yet the Court has had to act; and such was the course taken in the present case. No objection was made on either side, but I do not think any could have been taken on either side. But when questions not properly determinable by an actuary arise, I think they must, unless the parties have agreed to take the actuary as arbitrator, be ascertained in the manner appropriate to the particular question. In this case, when a question as to the value of the lands arose, the Court did not refer that to the actuary but to a valuer.

The first thing to be ascertained by the actuary in this case was the probability of the heir in possession, the Respondent, dying without male issue in the lifetime of each of the Appellants; for unless he did so they could get nothing. No point has been raised as to the mode in which this has been finally ascertained.

The next thing to do was to ascertain the probability of the nearest heir, Captain *M'Donald*, so dying. The age of the Captain, the fact of his being married, and the age of his wife, were not finally disputed. But the agent for the Appellants brought before the actuary this statement: "As regards Captain *M'Donald* himself, it is right to bring under the notice of the actuary the facts that in the year 1858 he fell over the cliffs at *Kinsail* and injured his head, and that he subsequently suffered from concussion of the brain. Abscesses formed in the wound which was made by the fall, and splinters of bone came away from time to time. In consequence of this fall he was an invalid for many months. He subsequently was obliged to leave the army, in consequence of a medical board deciding that after his accident he could not stand a warm climate; and at or about that time he suffered very much from the heat at *Gibraltar* where he was stationed. Since his discharge from the army he has been in very bad health, and subject to epileptic fits, and on several occasions his life has been almost despaired of. He had one of these fits so late as April, 1877, at which time it was not expected he would survive. These circumstances, it is submitted,

(1) Court of Sess. Cas. 4th Series, vol. v. p. 328.

go materially to reduce the value of the life interest of Captain *M'Donald.*"

The contention of the Respondent is that the actuary ought to proceed solely on the statistics relating to the value of an ordinary life, and that every other averment is irrelevant. I think the Legislature might have enacted this, but I think they have not; and I think it is impossible to hold that no exceptional case can vary the calculation. An extreme case may test this principle: An heir may be a young man, the expectation of whose life would be forty or fifty years. Suppose it to be averred that before the application to disentail the estate is made he met with an accident occasioning injury to the spine inducing incurable paralysis, so that he must pass the remainder of his life on a couch, and though he may linger for a time cannot live long, would it be proper to say that no inquiry should be made into such an allegation as this? Lord *Gifford* (1) shrinks from pushing his argument so far, and I think with reason. I think that the probability of life of an average man of that age is *primâ facie* the proper basis of an actuary's calculation. And I think Lord *Ormidale* seems not to deny that there may be cases in which there may be such insuperable difficulty in ascertaining the effect of exceptional circumstances on the value of the life as to leave no alternative but to take the actual age (2).

I agree with Lord *Gifford* that the Court ought not to attend to every allegation of something on which a guess might be made. I think it must be something on which the Court thinks an estimate may be reasonably made. It is easier to put cases as to the expectancy of marriage or issue, in which it would be proper to reject such averments, than as to the expectancy of life. But I can put one. The probability of life of a man residing in *England* is certainly greater than that of the same man residing in the tropics. Insurance companies habitually act on this, and protect themselves by putting in their policies a provision that the policy shall be void if the assured, without their license, goes into prohibited districts,—I think generally between the 32nd parallel of north latitude and the 32nd parallel of south latitude,—and

(1) Court of Sess. Cas. 4th Series, vol. vi. at p. 875.
(2) Ibid. at p. 872.

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Blackburn.

they grant such licenses on the terms that an increased premium shall be paid whilst he is within the prohibited space. Yet I think that an averment that the heir of entail was a keen sportsman who would enjoy elephant shooting, or a man of scientific tastes who would like to explore the course of the *Niger* or the sources of the *Nile*, and was therefore likely to go to *Central Africa*, should be rejected as irrelevant,—not on the ground that his doing so would not affect the probability of his living, but on the ground that there could not be any reasonable estimate of the chance of his so travelling. In this I agree with the Lord Justice Clerk, and I agree with him in thinking that it would be proper in any other case to reconsider the propriety of the decision of the Lord Ordinary *Rutherfurd Clark* in *De Virte* v. *Wilson* (1), under which the actuary was permitted to make a guess at the chance of Mrs. *Wilson's* children being, if she came into possession of the estate, liberal to her. In all other respects Lord *Rutherfurd Clark's* note on that case seems to me very sound.

But then I cannot think the averments here made are irrelevant on this ground. Had the only averment been that Captain *M'Donald* had twenty years ago met with a bad accident I might have hesitated. But it goes much farther. It is said that "he has been in very bad health and subject to epileptic fits, and on several occasions his life has been almost despaired of. He had one of these fits so late as April, 1877, at which time it was not expected he would survive." It may be that the facts are greatly exaggerated; but if correctly stated it becomes, I think, a question for medical skill to say whether such facts, when ascertained, do not shew that the vital energy has been diminished, and, if so, how much. I think if that is found it is a very convenient form to say as much has been taken out of his vital energy by this accident as would have been taken out of an ordinary man's vitality by so many years of ordinary life. And then it becomes a question for an actuary what difference that makes. In the first report of the actuary in this case he assumed without, I think, sufficient grounds or sufficient authority, that it had taken as much out of Captain *M'Donald's* vital energy as twenty years of ordinary life, and then came to the conclusion, which I suppose was correct,

(1) Court of Sess. Cas. 4th Series, vol. v. p. 328.

that on that supposition about 70 per cent. should be added to the value of expectancy of the Appellants. When this case was before the Lord Ordinary, and when it first came before the Court of Session it was supposed that Captain *M'Donald* had no objection to submit to a medical examination. The interlocutor of the 16th of January, 1879, was framed in conformity with the views of the Lord Justice Clerk and Lord *Ormidale*, but contrary to the view of Lord *Gifford*. By it the Court found the chances of Captain *M'Donald's* life ought, in respect of Captain *M'Donald's* consent, to be ascertained in the ordinary way by such professional examination and report as the Lord Ordinary may direct, and remit to the Lord Ordinary to give effect to them, and to proceed with the cause and reserve all questions of expenses.

It seems to me that this was a proper and sensible course to take. It turned out, however, that Captain *M'Donald* did not choose to be examined, and on that change of facts the Lord Justice Clerk changed his opinion as to the proper course to be pursued, and this interlocutor was recalled, and another substituted. "19th March, 1879. Remit to the Lord Ordinary to proceed with the cause on the footing that Captain *M'Donald's* life is to be assumed to be an average life, and to be estimated according to his present age, and also remit to the Lord Ordinary to dispose of all questions of expenses."

It was argued at the Bar that without a personal examination of Captain *M'Donald* no medical opinion could be formed. In this I cannot agree. I do not doubt that it would be more satisfactory that such a personal examination should take place, and I hope that Captain *M'Donald* will not persist in his objection; but I do not think it indispensable.

I have no skill in medicine myself; but both in civil causes and in criminal causes I have had many medical men give their evidence before me, and I think I am warranted in asserting that they in their diagnosis attach much importance to the history of the case—the antecedent facts. These they must in general ascertain as they best can. But a medical man finding a patient suffering from symptoms, and learning that he had recently been a passenger in a railway train when an accident happened, would not disregard that fact, and might probably on that fact think that

H. L. (Sc.) 1880 M'DONALD v. M'DONALD. Lord Blackburn.

the symptoms indicated the effect of a shock to the brain. If there was no such fact, but he learned that just before the illness came on the patient had been working in an ill-ventilated mine, or even sitting for hours in an ill-ventilated court or theatre, he might on that fact think that the symptoms indicated the effect of blood poisoning. In the present case I should expect that a medical man, either ascertaining for himself, if the Court refers it to him to do so, or learning from the findings of the Court what the facts were, might say, "The illness of Captain *M'Donald* in April, 1877, may either have only indicated that he ought to take care not to expose himself to the sun, but if he does take such care he may live as long as any one else; in which case I do not see how any estimate can be put on the diminished value of his life. Or it may have indicated that his constitution was impaired. If I had to judge only from the symptoms as reported to me I should have inclined with some doubt to one of these opinions," stating which it was. "But learning that during the three years that have since elapsed Captain *M'Donald* has been in good health," or "has been suffering repeated though slight attacks of the same sort" (as the case may be), "I am confirmed in that opinion," or "I am convinced that that opinion was erroneous.' I think, therefore, it is important, in remitting the case, so as to obtain the assistance of a medical man, to provide how such facts, which I think must be important, are to be ascertained.

The second point is one which may be treated more concisely. The heir in possession of an entailed estate in *Scotland* is the fiar, fettered as far as the provisions of the tailzie fetter him, and no further. If there is no one in existence who can enforce these fetters, he has the absolute fee. From this it follows that if it can be ascertained that all the heirs in existence will die without issue, the last survivor of the existing heirs will have the fee. A person who is in a tontine has a calculable interest in his expectancy of being the last survivor. Ought the analogous expectancy of one of the three heirs of entail to be the last survivor to be valued in this case, where there are four existing heirs after the heir in possession? The actuary has in this case valued it, and (what I should not have anticipated) found that it more than doubles the sum to be paid to these ladies. On objection the

Lord Ordinary thought he had done right. But all three Judges of the Second Division were of a contrary opinion. I have doubt and hesitation on this point, and if it rested solely with me I am not prepared to reverse their decision that this should not be valued.

The *Rutherfurd Act* proceeded on the assumption that the interests of the fourth heir under the fetters of the entail were too remote to make it proper to consult him as to the propriety of disentailing. This interest of the ladies only arising after the fourth heir has died without issue is still more remote. The words used in the amending Act of 1875 are not such as to make me believe that those who used them had the point present to their minds. But the object of the Act being to facilitate the disentailing of estates, if the words used are such as to be capable of bearing the construction that the only thing to be valued is the expectancy under the fetters of the entail whilst they exist, and not the expectation of the fee that may arise after they have expired, I think we should put on the Act of 1875 that construction which will forward the object of the Act. But I am not prepared to dissent from what I understand to be the opinion of both the noble and learned Lords who heard the argument, that the words of the Act are not such as to be capable of bearing that construction.

Lastly comes the question what is now to be done? I do not think that the valuation obtained on a wrong principle can stand. And if that is set aside simply, the disentail which has been made cannot stand. But if one of the heirs should die during the protracted litigation, the object of the Petitioner, the Respondent, is baffled; and I think that should not be allowed. The Respondent, though willing to pay the sum at which the Court has valued the interests of the two ladies, may not be willing to pay four times that amount. If so, the Court of Session will have to say what is to be done as to the costs incurred under the petition. If he is willing to pay whatever be ultimately found to be the value, I think it would be the reasonable course that he should pay into the bank, or otherwise secure to the satisfaction of the Court of Session, a sum equal to the utmost amount which it is probable will be added to the value at present come to, and that the litiga-

H. L. (Sc.)
1880
M'DONALD
v.
M'DONALD.
Lord Blackburn.

tion should proceed (if the parties wish it, which I hope they may not) as to that sum, the estate remaining disentailed. I think the form of order proposed will be proper if the sum mentioned is the right figure. I have not investigated that.

The costs of the appeal to this House should, I think, be given to the successful party, that is, the Appellants.

Counsel for the parties (Mr. *Benjamin* and Mr. *Collyer*) having stated that the exact amount made out by the actuary, taking into account Captain *M'Donald's* prospect of life and the chance of the Appellants succeeding to the fee simple, was £8122, the following judgment was delivered:—

The Appellants having (*by their Counsel*) *consented to an immediate disentail of the estates which form the subject matter of the appeal, on the terms of the Respondent paying within twenty-one days into the* British Linen Company's *bank such a sum as with the sum already deposited will make up the sum of* £8122, *as a security to answer the valuation herein-after directed to be made:*

It is Declared *and* Adjudged, *that in the event of such payment being made within the time aforesaid, the said interlocutor of the Lord Ordinary in Scotland, of the* 31*st of May*, 1879, *and the said interlocutor of the Lords of Session there, of the Second Division, of the* 7*th of June*, 1879, *complained of in the said appeal, so far as they approve of the instrument of disentail No.* 22 *of Process, and interpone authority thereto, and grant warrant for recording same in the Register of Entails, be affirmed: and in that event, it is* Ordered, *that it be referred to the Court of Session in Scotland to ascertain anew the value, in money, as at the date of the instrument of disentail of the expectancy or interest of the Appellants in the estates, within the meaning of the* Entail Amendment (Scotland) Act, 1875. *In the event of payment of the said sum not being made within*

the time aforesaid, it is Declared *and* Adjudged, *that the interlocutors complained of in the said appeal be reversed* simpliciter : *and it is* Ordered, *that the said cause be, and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment : and it is further* Ordered, *that in either case the Respondent do pay or cause to be paid to the said Appellants the costs incurred in respect of the said appeal, &c.*

Lords' Journals, 12th March, 1880.

Agents for Appellants : *Grahames, Wardlaw, & Currey.*
Agent for Respondent : *Andrew Beveridge.*

[PRIVY COUNCIL.]

J. C.* 1880 *April* 6, 7, 8, 9; *May* 6.

HER MAJESTY THE QUEEN AND ANOTHER APPELLANTS; AND MANOEL DOS SANTOS CASACA AND OTHERS RESPONDENTS.

ON APPEAL FROM THE VICE ADMIRALTY COURT OF SIERRA LEONE.

Slave Trade Acts—Seizure of Portuguese Ship in Harbour—Obligation of Seizor to justify his acts—Absence of reasonable Ground of Suspicion—Primâ facie Evidence of Slave Trading—Treaty with Portugal—6 & 7 *Vict. c.* 53.

The "*O.*," a Portuguese vessel, was seized on the 5th of December, 1876, whilst lying at anchor in the harbour and port of *F.*, in *Sierra Leone*, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the *Slave Trade Act*, 1873), but was subsequently released by the Court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:—

Held, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be *primâ facie* evidence of a vessel being engaged in the slave trade, both by the treaty between *England* and *Portugal*, carried into effect by 6 & 7 Vict. c. 53, and by the *Slave Trade Act*, 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade.

The obligation upon a seizor to justify the seizure under the *Slave Trade Acts* of a vessel plainly engaged in *bonâ fide* trade within a harbour is a very strict obligation.

The Ricardo Schmidt (1) approved.

A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free labourers, and not of con-

---

* *Present*:—SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH,

---

(1) Law Rep. 1 P. C. 268; S. C. 4 Moore, P. C. 121.

signing them to slavery, would not have justified the seizure and detention of the vessel.

According to the true construction of the Portuguese treaties, the consent on the part of *Portugal* that certain articles mentioned in the first schedule to the *Slave Trade Act*, 1873, when found on board a Portuguese vessel, shall be considered as *primâ facie* evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The 4th section, therefore, of the Act cannot be extended to a Portuguese vessel lying in British waters.

APPEAL from an interlocutory decree of the Vice-Admiralty Court (Nov. 9, 1877), so far as the said decree awarded damages and costs against the Appellant, *James Craig Loggie* (the seizor).

The facts are stated in the judgment of their Lordships.

The learned Judge of the Court below came to the conclusion that the Appellant, *James Craig Loggie*, was duly authorized to seize vessels under the *Slave Trade Act*, but that the said vessel was not in fact engaged within British jurisdiction in the slave trade, and that consequently the said *James Craig Loggie* had no authority to seize her; that there being no evidence adduced to shew a guilty knowledge on the part of the owners, the vessel on that ground would be necessarily restored; that the story of the Kroomen witnesses, alleging that three of the Kroomen on board the said brig were kidnapped slaves, and alleging otherwise, that the said brig was engaged in the slave trade, was a made up story unreasonable improbable and without foundation in fact, and that there were no reasonable grounds for suspecting that the *Ovarense* was either engaged in or fitted out or equipped for the purpose of the slave trade, either at the time of her seizure in the harbour of *Freetown* or since her departure from *St. Thomas* for the said port, and that no probable cause existed for seizing her or for bringing her to adjudication, and that no reasonable mind could think otherwise, and that he did not think it would be deemed necessary that the captain of even a merchant vessel seen to be taking in water and casks on board in the harbour would be required to produce any certificate such as that required by the *Slave Trade Act*, before he had completed taking in his necessary supply, nor until he was about passing his entry outwards after lading his vessel; that under the circumstances the taking of such water and casks on board would not be a ground

J. C. 1880 THE QUEEN v. CASACA.

of suspicion, nor would the fact that they were found on board *per se* render her liable to be seized; that the finding of thirty-two mats not entered on the manifest of an immigrant ship on the West Coast of *Africa* was not *per se* a good ground of suspicion; and even if such finding were a good ground of suspicion, that there was no sufficient evidence that such thirty-two mats were more than sufficient for her crew. And the learned Judge accordingly decreed the restoration of the brig *Ovarense*, her tackle and apparel, and the goods and effects on board, and of the two surviving Krooboys alleged to be slaves, one of the three having died, with damages and expenses against the seizor, to be paid by him to the owners and also to the charterers of the vessel, with full costs of suit.

The Attorney-General (Sir *J. Holker*), and Mr. *A. V. Dicey*, for the Appellants, contended that upon the evidence the brig must be found to have been at the time of the seizure fitted out for the purposes of, and engaged in, the slave trade within British jurisdiction. If, from the absence of guilty knowledge on the part of the owners, the Judge was right in not condemning the ship, yet the seizor ought not to have been condemned in costs and damages. Assuming the evidence did not establish that the brig was engaged in or fitted out for the purposes of the slave trade, it nevertheless established reasonable grounds of suspicion to that effect, which justified the seizure under the *Slave Trade Act*, 1873, s. 3; it being admitted that the particulars mentioned in the 1st schedule of the Act were found on board. Accordingly under sect. 4 of the Act, which is nearly identical with 5 & 6 Will. 4, c. 60, s. 3, the seizure is exempt from all claim for damages and costs in respect of the visitation, seizure, or detention of the brig or otherwise. With regard to the proviso that the section should not extend to the vessel of any foreign state except so far as consisted with the treaty made with such state, reference was made to the treaty of July 3rd, 1842, recited in 6 & 7 Vict. c. 53. Lastly, it was the duty of the Court to certify under the circumstances of the case that there was reasonable or probable cause for the seizure: see *Slave Trade Act*, 1873, s. 17, and *Customs Laws Consolidation Act*, 1876, s. 267. Reference was made to the *Ricardo*

Schmidt (1), a case decided under 5 Geo. 4, c. 113; *Barton* v. *Sheriff* (2); *Chamberlain* v. *King* (3); *Wedge* v. *Berkeley* (4).

Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson* (Mr. *Ernest Law* with them), for the Respondents, contended that the decree was right. It was proved that the ship was an emigrant ship, duly licensed according to the Portuguese regulations, and was not in fact engaged in the slave trade. It was not a merchant vessel within the meaning of the 5th and 10th clauses of the 1st schedule to the *Slave Trade Act*, 1873, and the alleged slave-trading was not in British jurisdiction. Consequently the Court was without jurisdiction. The treaty of 1842 applies only to seizures on the high seas. There was, moreover, no reasonable ground of suspicion to justify the seizure and detention of the vessel. If the seizor before seizing the ship had made due inquiry from the master he could and would have learnt that the ship was not engaged in the slave trade, and that the articles and Kroomen on board were so for lawful purposes. Further, there was no possible excuse for the detention of the vessel for eleven months, during which time full information as to the true character and employment of the vessel was easily procurable. With regard to sect. 4 of the *Slave Trade Act*, 1873, the proviso operates to prevent the first part of the section from applying to vessels in harbour, the subject of the Portuguese treaty; otherwise upon the evidence the case was taken out of the section.

Mr. *Dicey* replied.

The judgment of their Lordships was delivered by

SIR ROBERT J. PHILLIMORE:—

This is an appeal from so much of a decree of the learned Judge of the Vice-Admiralty Court of *Sierra Leone* as awarded damages, expenses, and costs to the Respondents against the Appellants. The decree was made in a cause brought by the Appellants against the Portuguese vessel called the *Ovarense*, of which the Respon-

(1) Law Rep. 1 P. C. 268; S. C. 4 Moore, P. C. (N.S.) 121.
(2) 2 Moore, P. C. 19.
(3) Law Rep. 4 C. P. 474.
(4) 6 Ad. & E. 663.

J. C. 1880 THE QUEEN v. CASACA.

dent, *Manoel dos Santos Casaca*, was master, and the Respondents, *Manoel Roderigues Formigal* and *Fernando de Olivera Bello*, of *Lisbon*, merchants, were the sole owners, and against her tackle, apparel, and furniture, and the goods, wares, merchandise, and moneys on board the same, and against three alleged male slaves, *Grando*, *Panik*, and *Yoroba*, seized by *James Craig Loggie*, as liable to forfeiture under the provisions of the statutes 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the *Slave Trade Act*, 1873).

The *Ovarense* was seized by *James Craig Loggie* on the 5th of December, 1876, whilst lying at anchor in the harbour and port of *Freetown*, in *Sierra Leone*.

Mr. *Loggie* was duly authorized by the Governor of *Sierra Leone* to seize, detain, and arrest all vessels which should or might be liable to be forfeited for any offence committed against the provisions of the said Acts of Parliament.

The Appellants proceeded by libel, and alleged that the brig *Ovarense*, being in the harbour of *Freetown*, in British waters, was engaged in and fitted out for the slave trade, having on board three slaves and a larger quantity of water than was requisite for the consumption of the crew of the brig as a merchant vessel, and an extraordinary number of empty casks for which no certificate was produced that security had been given that these casks were for lawful traffic; and also seventy-three bags of rice and thirty-two mats, such rice and mats being as alleged more than necessary for the use of the crew; and that the brig had shackles concealed on board on her arrival, which were afterwards removed; that *Manoel dos Santos Casaca* and *Francisco Ferreira de Moraes* were not engaged in emigration according to law, but were engaged in the slave trade; that the aforesaid three slaves were carried away by *Francisco Ferreira de Moraes* from *Cape Palmas*, to be dealt with as slaves; and they prayed that the said ship and slaves should be forfeited, and *Manoel dos Santos Casaca* condemned in costs.

In reply, the Respondents filed their plea, alleging that the said brig was not engaged in or fitted out for the slave trade, but was an emigrant vessel, duly licensed as such, and that the three persons on board were not slaves but free immigrants, destined for the Portuguese island of *St. Thomas*, where slavery did not exist;

that the rice was in the brig's manifest; that the thirty-two mats were old mats which had been left in the said brig from the last voyage, having been used to line the said brig when laden with coffee, as is usual; that of the water two tanks and nine puncheons were in the manifest, and the remainder had been taken on board in the harbour of *Freetown* after the arrival of the said brig; that of the empty casks some had contained stores, and the remainder had been taken on board in the said harbour of *Freetown* after the arrival of the said brig, and that therefore the certificate mentioned in the libel was not required by law until the said brig cleared out of the said harbour; and that there never were any shackles on board; and the plea prayed that the suit should be dismissed, and the brig, tackle, and goods and the three alleged slaves should be restored and the seizor condemned in costs, losses, damages, demurrage, and expenses.

It may be as well to dispose at once of a point which was raised on the argument, that the Judge had not certified under the *Customs Consolidation Act*, 1876 (39 & 40 Vict. c. 36), s. 267, that there was reasonable cause for the seizure of the brig. Their Lordships are clearly of opinion that the provisions of the Act in question do not in any way affect the present case.

A great many witnesses were examined, both on behalf of the seizor and of the claimant. The evidence was generally of an unsatisfactory kind, and resulted in a great conflict of testimony.

But after taking some time to consider the written depositions and documentary evidence, the learned Judge of the Vice-Admiralty Court, on the 9th of November, 1877, pronounced judgment in favour of the Respondents (the then claimants), and "decreed the said brig, goods, wares, merchandise, and two of the said three boys, *Grando* and *Yoroba*, called slaves, surviving at the time of the passing of the said sentence, to be restored to the claimant, on behalf of himself, and of *Manoel Rodrigues Formigal* and *Fernando Oliveira de Bello*, for the brig, her tackle, apparel, and furniture, and on behalf of the said *Francisco Ferreira de Moraes* for the goods, wares, merchandise, and moneys, and for two of the said three boys called slaves, *Grando* and *Yoroba*, surviving at the time of the passing of the said sentence, and condemned the said seizor in costs and damages."

J. C.
1880
THE QUEEN
v.
CASACA.

From this condemnation in costs and damages, though not from the release of the ship herself, the seizor has appealed. In arguing the case before the Court, his counsel have maintained that there was evidence which would have justified the condemnation of the ship, though in the absence of proof of the guilty knowledge of the owners such a condemnation, according to the law laid down upon the subject, could not be enforced. They have, nevertheless, used the evidence which, as it was alleged, ought to have enured to the condemnation of the ship, in support of his claim to be relieved from that part of the sentence which condemned him in costs and damages.

There are two questions of mixed law and fact which their Lordships are called upon to decide. In order to arrive at this decision it becomes necessary to consider and construe some of the statutes relating to the slave trade, and the treaty as to this subject between *England* and *Portugal*. And first with regard to the statutes.

The learned Judge of the Court below rightly observed that,

"Before the passing of the Act 36 & 37 Vict. c. 88, the statute 5 Geo. 4, c. 113, was the law by which we were to be guided in cases of slave-dealing within British waters and jurisdiction, and under that law, and in accordance with decisions pronounced in cases coming under it, the captors were bound to prove, in order to condemn the vessel, not only that she was actually engaged in the slave trade or fitted out for the purposes of the slave trade, but that the owners of the ship were cognizant of the fact or had a guilty knowledge thereof, and that the owners of the cargo on board had also a guilty knowledge of the fact to justify a forfeiture of their goods, but that if there was probable cause for the seizure, that is, if from all the surrounding circumstances there was, to a reasonable mind, a fair and reasonable suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade, then, although the vessel were restored, no damages could be awarded against the seizor."

The next statute which has to be considered is the 6 & 7 Vict. c. 53, which came into operation August, 1843. That statute carried into effect a treaty between *England* and *Portugal* for the

suppression of the traffic in slaves, which had been concluded the 3rd of July, 1842.

The first and second articles of the treaty, which is set forth in the schedule to the Act, are as follows :—

"I. The two high contracting parties mutually declare to each other that the infamous and piratical practice of transporting the natives of *Africa* by sea for the purpose of consigning them to slavery is and shall for ever continue to be a strictly prohibited and highly penal crime in every part of their respective dominions, and for all the subjects of their respective Crowns.

"II. The two high contracting parties mutually consent that those ships of their royal navies respectively which shall be provided with special instructions, as hereinafter mentioned, may visit and search such vessels of the two nations as may upon reasonable grounds be suspected of being engaged in transporting negroes for the purpose of consigning them to slavery, or of having been fitted out for that purpose, or of having been so employed during the voyage in which they are met by the said cruisers; and the said high contracting parties also consent that such cruisers may detain, and send, and carry away such vessels in order that they may be brought to trial in the manner hereinafter agreed upon; and in order to fix the reciprocal right of search in such a manner as shall be adapted to the attainment of the objects of this treaty, and shall at the same time prevent doubts, disputes, and complaints, it is agreed that the said right of search shall be exercised in the manner and according to the rules following."

Certain articles are then described, which, if found on board of or in the equipment of any vessel visited in pursuance of the treaty, are declared to be *primâ facie* evidence that the vessel was actually engaged in the slave trade, and by Article X. it is declared that,

"If any of the things specified in the preceding article shall be found in any vessel which is detained under the stipulations of this treaty, or shall be proved to be on board the vessel during the voyage on which the vessel was proceeding when captured, no compensation for losses, damages, or expenses consequent upon

J. C. 1880 THE QUEEN v. CASACA.

the detention of such vessel shall in any case be granted either to her master, or to her owner, or to any other person interested in her equipment or lading, even though the mixed commission should not pronounce any sentence of condemnation in consequence of her detention."

Among these articles are mentioned shackles, bolts, or handcuffs, an extraordinary number of empty casks, an extraordinary quantity of rice, and mats.

These are the articles specified in the libel.

They are also mentioned in the first schedule of 36 & 37 Vict. c. 88, as among the equipments which are *primâ facie* evidence of a vessel being engaged in the slave trade.

This statute, entitled "An Act for consolidating with Amendments the Acts for carrying into effect Treaties for the more effectual suppression of the Slave Trade, and for other purposes connected with the Slave Trade," was passed on the 5th of August, 1873.

It is a statute which is by no means perspicuously worded, and which has not as yet undergone any judicial construction.

The 3rd section enacts that "where a vessel is on reasonable grounds suspected of being engaged in or fitted out for the slave trade, it shall," subject to certain restrictions, "be lawful" for certain authorized persons, among whom is, as in this case, the Governor of a British possession, "to visit and seize and detain such vessel, and to seize and detain any person found detained or reasonably suspected of having been detained as a slave, for the purpose of the slave trade, on board any such vessel," &c.

The first and principal question is whether the *Ovarense* was seized on reasonable grounds of suspicion of her being engaged in the slave trade.

What were the facts relating to this vessel at the time when she was seized? The first and not the least important fact is that she was seized in harbour and not upon the open seas. And here it may be well to cite the language of Lord *Westbury* delivering the judgment of the Privy Council in a similar case (*The Ricardo Schmidt* (1).

(1) 4 Moore's P. C. 136. 2 L.J. P.C. 280

The law at that time stood, it is true, under 5 Geo. 4, c. 113, but the reasoning is not inapplicable to the present case.

"We have, therefore," his Lordship says, "no circumstances here to which any particular weight or force is to be given by law, as under 5 & 6 Will. 4, c. 60, would be the case, but we have a case, to be judged of under all the circumstances, whether any person going on board a ship lying in the harbour of *Sierra Leone* and examining her—going over her—could from the mere circumstance of the number of water casks be warranted in arriving at the conclusion that this ship was intended to be engaged in the slave trade. I need not point out, what was very well commented upon by one of the counsel for the Appellant, that there may be great necessity for laying down clear and definite rules, as they are laid down in the statute 5 & 6 Will. 4, c. 60, for the purpose of guiding captors at sea, for there the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature, therefore, defines certain things in that statute, which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the captor from consequences even if the vessel be not condemned. But when you come to the case of a ship quietly lying at anchor in a British harbour, and having been there for some time, not manifesting the smallest indication of anxiety to quit the harbour, but actually and plainly engaged in *bonâ fide* trade within the harbour, the obligation on a seizor to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which, *per se*, have not an overpowering weight on the mind at the time when the seizure was made."

The *Ovarense* arrived in the port of *Freetown* without any apparent circumstance of guilt attaching to her conduct. She remained there quietly. There was no restraint as to persons leaving or coming on board her. She seemed to have been in no hurry to get away. It certainly was, on the face of it, a strange thing to select a British port for the visit of a slave-trading vessel, in order, amongst other things, to take in an excessive quantity of water, and, as alleged, with some slaves actually on board.

J. C. 1880 THE QUEEN v. CASACA.

The general defence on the part of the owners of the *Ovarense* is that she was equipped with the object of facilitating the immigration of free labourers from the West coast of *Africa* into the Portuguese island of *St. Thomas*, and it must be borne in mind that many of the articles are *ancipitis usus*, that is, are equally necessary for the carrying on of the guilty slave trade, and for the purpose of innocent immigration.

Slavery (even in the modified form established by a decree having the force of law of the 25th of February, 1869) had been abolished in *St. Thomas* by a law passed on the 29th of April, 1875, to come into operation a year after publication.

An immigration ship would, of course, require a greater number of empty casks and a greater quantity of water than would be necessary for the crew, and the presence of some shackles on board would be no necessary indication of slave trading.

It appears that the *Ovarense*, a brig of 309 tons, was chartered in September, 1876, by one *De Moraes* for the purpose of taking immigrants to *St. Thomas*, and, on the 26th of December, cleared out for the port of *Liberia* and *Sierra Leone*. The governor of *St. Thomas* gave the captain a letter, addressed to the Portuguese Consul at *Sierra Leone*, informing him that the *Ovarense* was licensed to carry 368 freemen, or 400 men if a small half deck could be added to take water at *Sierra Leone* for that number. She sailed from *St. Thomas* with a list of passengers signed by the proper Portuguese authority. On the 2nd of December, 1876, she arrived in the harbour of *Freetown, Sierra Leone*. She had taken in six Kroomen at *Cape Palmas*, three of whom were alleged to be slaves. On the 4th of December the captain entered his vessel at the customs, and left with the acting Portuguese Consul the ship's papers. Early on the 5th of December Mr. *Loggie* came on board the *Ovarense*. He paid three visits to the vessel on that day, and at the last visit seized the vessel, and brought the three Kroomen on shore.

The Portuguese Consul swears that he received all the ship's papers soon after the arrival of the vessel in harbour. His evidence is as follows:—

"The captain came to me first on the 3rd of December in the morning. I never went on board the *Ovarense*. I heard on the

5th of December she had been seized. On hearing this I went to the Custom House, and from thence to the Governor. I saw the collector before I went to the Governor. I went alone to the Governor officially as Consul for *Portugal;* it was Governor *Kortright.* I saw him. I had some official conversation with the Governor as to the *Ovarense.* I had seen the Governor officially before this on the 30th of November and the 3rd of December, 1876, respecting the *Ovarense.* After this I left his Excellency. On the 6th of December I wrote a letter to his Excellency on the subject of the *Ovarense,* and to that letter I received an answer. On the same day I wrote a second letter to his Excellency, to which I received no answer. *Loggie* came to me about the *Ovarense* first on the 7th or 8th of December, but I am not certain on which day. He came alone. He applied to me for the papers of the *Ovarense.* He said he had come to the Portuguese Consul, not to his friend *Becaise,* and wished to have the papers of the *Ovarense* shewn to him. I told him I could not shew them, because he brought no authority. I told him the best thing he could do would be to apply to the Governor, and on the Governor saying he, *Loggie,* might see the papers, I would hand the papers to the Governor. Nothing more passed, and *Loggie* went away. I never told *Loggie,* on that or any other occasion, 'that there was no certificate as aforesaid from the Custom House at the place from which the said master cleared outwards, stating that a sufficient or any security had been given by the owners of such vessel that such extra quantity of casks and other vessels for holding liquid should only be used for the reception of palm oil or for other purposes of lawful commerce.' I never told him a word about this. I had no conversation with him about a certificate. *Loggie* came to me again about the *Ovarense;* this was about four or five days after the seizure, but I can't recollect the exact day. On this occasion he asked me to give him the ship's papers, because his proctor wanted to see them; and that he (*Loggie*) would give a receipt for them. This is what he told me at first. I refused to give the papers. *Loggie* then said that Mr. *Lewis,* his proctor, would give the receipt, and that I need not be afraid. I told him I was very sorry, but that all the papers he required were in the Governor's hands; that I

J. C. 1880 THE QUEEN v. CASACA.

had handed them to the Governor, and that even if I had them I could not hand them either to himself or his proctor. *Loggie* did not come to me again about the *Ovarense*. I am sure he never came to me before the 7th of December to ask any information about the *Ovarense*. I might have seen *Loggie* on the 3rd of December, but not to speak to. I did not see him on the 4th of December, and I had no conversation with him before the 7th of December."

The papers lodged at the Consulate as before mentioned, and produced in evidence were:—

1. A Royal passport, dated *Lisbon*, the 9th of June, 1870, with twenty-two *visés* thereon, shewing a trading of the *Ovarense* between the ports of *Lisbon* and *Rio de Janeiro, Pernambuco, Bahia*, and the Portuguese island of *St. Thomé*, the last *visé* being *St Thomé*, the 25th of September, 1876, for a voyage to the ports of *Liberia* and *Sierra Leone*.
2. The brig's articles.
3. The charterparty between the owners and *Moraes* to take labourers to *St. Thomas* from the ports of *Liberia* and *Sierra Leone*, *Moraes* the charterer binding himself to furnish water casks and water, to make a half deck for an additional number of labourers to make up 400, the *Ovarense* being computed to carry without such additional half deck, 368 persons; also to provide a person to take charge of these free labourers, and a doctor and medicine, and to pay monthly to the owners as freight one conto of reis, equal to £222. 4*s*. 6*d*.

4, 5. The licenses to *Moraes* and the captain to import free labourers into *St. Thomas*, already referred to.

6. The letter from the Governor of *St. Thomas* to the Portuguese consul here also already referred to.

If Mr. *Loggie* before resorting to the serious step of seizing the ship had taken the ordinary precaution of consulting the ship's papers and communicating with reference to them with the consul and the captain, he could not have failed to see that she was licensed to import free labourers, which would account for the articles found in her, and that he would not be justified simply

from the fact that such articles were on board her in seizing this foreign vessel "as being engaged in or fitted out for the slave trade within British jurisdiction." With regard to the allegation that the brig herself was constructed and furnished or fitted out to carry slaves, the ship's papers and the charterparty would have shewn, and there seems to have been no reasonable ground for disbelieving them, that she was chartered and intended to carry immigrants, and was not engaged in the slave trade. And, even if the original seizure could be justified, the subsequent detention of the vessel was wholly inexcusable.

Much stress was laid upon the presence on board the vessel of the three Kroomen alleged to be slaves, and the information concerning them which had been given to the seizor, as constituting reasonable grounds for the suspicion that she was a slaver. Their Lordships are of opinion that the appeal cannot be maintained on this ground. They have already observed that the seizor had the means, which he neglected, of informing himself of the true character of the vessel, and of the true condition of those Kroomen. Had he done so, and had even all the evidence which was afterwards given on his part touching those Kroomen been present to his mind (which it was not), all that he could reasonably have inferred was that the men in question had been, in some sort, kidnapped on board, with the object of carrying them to *St. Thomas* (an island where slavery had ceased to exist) as free labourers imported under the immigration law then prevailing. But such an inference, or belief, would not have justified the seizure or detention of the vessel under the treaty, or, the *Slave Trade Act*, 1873, such supposed kidnapping, however reprehensible, being for a purpose other than that "of consigning the men to slavery." It may be that the immigration law of *St. Thomas* may not be sufficiently stringent, or that its provisions may not be duly observed; but defects in the law, or breaches of its provisions by Portuguese subjects, however deplorable, though they might be properly made the subject of diplomatic remonstrance to the Portuguese Government, are not grounds for seizing a vessel under the Portuguese flag as a slaver within the meaning of the treaty and the statute. In saying this their Lordships are assuming that on this part of the case the evidence given for the seizor

J. C. 1880 THE QUEEN v. CASACA.

was more credible than that opposed to it. That, however, was not the conclusion of the Judge below, and their Lordships are not prepared to say that he was wrong. The evidence taken altogether certainly afford grounds for the conclusion that the story of the kidnapping was a malicious fiction, got up by one of the other Kroomen who had been charged by *Moraes* with theft, and put under confinement.

There remains for consideration the 4th section of the 36 & 37 Vict. c. 88. That section is as follows:—

"Where any of the particulars mentioned in the first schedule to this Act are found in the equipment or on board any vessel visited, seized, or detained in pursuance of this Act, such vessel shall, unless the contrary be proved, be deemed to be fitted out for the purposes of and engaged in the slave trade, and in such case, even though the vessel is restored, no damages shall be awarded against the seizor under this Act in respect of such visitation, seizure, or detention, or otherwise upon such restoration."

Much argument was addressed to their Lordships as to the effect and meaning of the terms contained in this section, and the case for the Appellants was mainly, though by no means entirely, rested upon it, it being contended that the words "no damages shall be awarded" contained an enactment of positive law, which, whether harsh or not, left no option to the Court upon the matter, unless indeed the proviso at the close of the section rendered the enactment inapplicable to this foreign vessel. The words of that proviso have been most carefully considered by their Lordships, they are as follows:—

"Provided that this section shall not extend to the vessel of any foreign State, except so far as may be consistent with the treaty made with such State."

This provision contains a plain proposition of international law, with respect to the general effect of the law of one foreign State upon the vessel of another.

It has been contended, however, that *Portugal* has, by treaty with *England*, consented that the particular articles mentioned in the first schedule of this statute, when found on board a Portuguese

vessel in port, shall be considered as *primâ facie* evidence of her being engaged in the slave trade. But upon a careful examination of the Portuguese treaties, their Lordships are of opinion that the consent on the part of *Portugal* relates only to vessels upon the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. All the provisions in the treaties point to this conclusion. The visitation is to be conducted by a naval officer whose rank is carefully specified, and with a view formerly of bringing in the vessel for adjudication before a Court of mixed commission, and now of sending her to the nearest or most accessible Portuguese colony, or handing her over to a Portuguese cruiser, if one be available in the neighbourhood of the capture. Their Lordships are of opinion, therefore, that this 4th section cannot be extended to a Portuguese vessel lying in British waters, inasmuch as it is not consistent with the treaty made with that State.

Upon the whole, it appears to their Lordships that the learned Judge of the Court below came to a right conclusion, both as to the facts and the law applicable to them, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitor for the Appellants: *The Solicitor, Treasury.*
Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

[PRIVY COUNCIL.]

J. C.* JOSEPH PITTS . . . . . APPELLANT;

1880

AND

April 20, 21; *May* 11. EDWARD LA FONTAINE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Consular Court of Constantinople—Procedure.

In a suit in the Consular Court of *Turkey* brought by the Respondent against the wife of the Appellant, for a sale of a piece of land in *Prinkipo*, with the mill and bakery erected thereon, and for the payment of three-fourths of the proceeds of such sale into Court; it appeared—

(1.) That the Respondent was trustee in liquidation in respect of three-fourths share only in the beneficial interest in the said property, which share was subject to a mortgage; the Appellant, who was no party to the suit, being entitled to the remaining one-fourth share unincumbered;

(2.) That the Defendant, having been originally a Turkish subject, had been made ostensible owner and trustee of the said property, in order to satisfy or evade the law of *Turkey;* but had thereafter by her marriage with the Appellant become a British subject.

The Court thereupon ordered, with costs against the Defendant, on the 18th of July, 1874, that the whole of the property should be sold, and the whole of the proceeds paid into Court. In 1876, however, the Respondent sold the three-fourths share thereof to *C.*, as agent of the mortgagee, by private contract, and received the purchase-money thereof.

On the 27th of March and 13th of June, 1878, the Court granted *ex parte* applications of the Respondent that the Defendant be ejected from the whole of the said property, with costs, and that the mill be closed. This was done and the seals of the Court put upon it.

On the 17th and 28th of June, 1878, the Court refused applications by the Appellant first for a rule nisi to set aside the said orders, on the ground that he was owner of one-fourth share of the mill and sole owner of two ovens attached to the mill; that *C.* had paid for and obtained possession of his three-fourths share; and that the Respondent had ceased to have any interest in the said property. Second, for leave to appeal to Her Majesty in Council against the order of the 17th of June.

Thereafter by a series of orders the Court refused to set free the moveable property so placed under seal at the mill, or to set free the said two ovens, refused to the Appellant a rule nisi to that effect, and refused to sus-

---

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

pend the proceedings and re-open the mill and ovens until security for damage be given, in the latter case directing the Defendant, who was no party to the application, to pay the costs. A further order *ex parte* on the application of the Respondent was made that exclusive possession of the mill, bakery, and ovens be given to *C.*, and that the Defendant remove certain moveable property on filing an affidavit that the same belonged to her and her husband, and that he consented to such removal; in default whereof the Court, in the first instance, ordered that the same should be sold, but subsequently discharged this order on the application of the Respondent, and substituted for it an order that the Respondent should be at liberty to remove the moveable property not belonging to him, and the Defendant pay the costs:—

Held, that the Appellant had unquestionably suffered grievous wrong by reason of these irregular proceedings made in a suit to which he was no party. The Defendant could not be sued as trustee without joining her husband, and was not the representative of her husband *quoad* his beneficial interest in the property. The Court could not compel a sale nor put a purchaser into possession of more than the three-fourth's share (subject to the mortgage), which was vested in the Respondent.

Having regard to the power of the Turkish authorities over the land, and to the fact that *C.* was not subject to the jurisdiction of the Consular Court, no order could be made directing restoration of possession or decreeing damages, but the orders appealed against were declared to have been irregularly and improperly made, and were set aside with costs.

APPEAL from an order of Sir *Philip Francis*, the late Judge of the Supreme Consular Court at *Constantinople* (July 18, 1874), by which certain real estate situate in the island of *Prinkipo*, in the *Sea of Marmora*, within the limits of the Ottoman Empire, and known as the *Prinkipo Steam Flour Mill*, was directed to be sold. Also from certain orders subsequently made by Mr. *J. H. Fawcett*, the present Judge of that Court, for the purpose of enforcing the order of the 18th of July, 1874.

The orders appealed from and the facts of the case sufficiently appear in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *Hornell*, for the Appellant, contended that the Consular Court had no jurisdiction to order any portion of the land at *Prinkipo*, in the Turkish dominions, or the buildings created thereon, to be sold. Reference was made to the order of the Queen in Council, dated the 30th of November, 1864, creating the Court (paragraph 26), and to the protocol relative to the admission of British subjects in *Turkey* to the right of holding real property dated the 28th of July, 1868. The suit in

J. C. 1880 PITTS v. LA FONTAINE.

which the several orders appealed from were made was not properly constituted: the parties interested were not before the Court. There does not appear to be any case in which a Court of Equity has made a personal decree against the wife alone: see *Daniel's* Chancery Practice [5th Ed.], vol. i. p. 169: *Francis* v. *Wigzell* (1). A wife cannot be made responsible for breaches of trust, nor can even her separate estate be bound in a suit to which the husband is not a party: *Wainford* v. *Heyl* (2); *Holmes* v. *Penney* (3). Even if the order of the 18th of July, 1874, was within the jurisdiction of the Court to make, it illegally ordered the sale of the Appellant's property in a proceeding to which he was not a party; and in any event the Appellant, as the owner of one undivided fourth of the mill, was entitled to remain in possession of and to work the mill. Moreover, he had been ejected by these proceedings not only from the property of which *Constantinidis* had, notwithstanding the terms of the order of the 18th of July, 1874, become the part owner, but also from the separate building and ovens of which the Appellant is the exclusive owner. Further, after the sale to *Constantinidis* and the payment by him of his purchase-money, the Respondent had no further interest in the matter, and was incompetent to take further proceedings against the Appellant or his wife.

Mr. *Butt*, Q.C., and Mr. *Frank Safford*, for the Respondent, contended that pure English law is not to be administered by Consular Courts, but that local customs are to be considered. Reference was made to 6 & 7 Vict. c. 94, the *Foreign Jurisdiction Act*, and to the Order in Council, 30th of November, 1864, s. 8. The Defendant must be treated as a *feme sole;* and as to the point that the Appellant her husband should have been made a party either as husband or part owner, that objection was not taken in the Court below. An order can be made against a wife as a *feme sole*: see *McHenry* v. *Davies* (4). Where her separate estate is concerned she can defend it. Reference was made to the *Vendors and Purchasers Act*, 1874 (37 & 38 Vict. c. 78, s. 6). [Mr. *Benjamin*:—That was passed after the order of the 18th of July, 1874]. See *Judicature Act*, 1875, rule 16. It was contended that

(1) 1 Madd. 258.
(2) Law Rep. 20 Eq. 321, 324.
(3) 3 K. & J. 90, 94.
(4) Law Rep. 10 Eq. 88.

the order of the 18th of July, 1874, was made with jurisdiction, and that all the subsequent orders were made in order to carry it into effect, and were necessary in order to effectuate the sale and complete the title of the purchaser.

Mr. *Benjamin*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

At the close of the argument in this case, it was admitted that the Appellant had established his right to some relief in respect of the extraordinary and complicated proceedings in the Supreme Consular Court of *Constantinople* which are the subject of appeal. The question which their Lordships reserved for consideration was what relief, having regard to the peculiar nature of the case, the limited powers of the Consular Court over the subject-matter, and the rights which other parties have acquired, they could recommend Her Majesty to grant. In order to determine the question it is desirable to consider shortly what were the position and rights of the different parties concerned when the proceedings impeached were commenced.

In the year 1860, the Appellant and three persons, viz., *Thomas Browne Morton*, *Emanuel Petrocockino*, and *John Bell*, who then carried on the business of shipowners and chandlers in partnership under the style of *Morton & Bell*, were the joint owners of the beneficial interest in a piece of land in the island of *Prinkipo*, in the Sea of *Marmora*, upon which they erected a steam flour-mill and bakery. Foreigners being at that time incapable of holding land in *Turkey*, the whole estate stood in the name of *Ellen Jani*, then the wife of *Emanuel Petrocockino*, and an Ottoman subject though her husband was apparently a Greek subject, as its ostensible owner. But she, by a declaration of trust, dated the 23rd of May, 1863, and registered in the Supreme Consular Court, declared it to be the property, as to three-fourths, of Messrs. *Morton & Bell*, and as to one-fourth of the Appellant, and that it was held by her to their use, and to be dealt with according to their order.

J.C. 1880 PITTS v. LA FONTAINE.

On the 25th of May, 1863, *Morton & Bell* mortgaged their three-fourth shares of this property to *Paul Homére*, or *Homero*, a Greek subject, for £3000 by the instrument which is set out in the Supplemental Record. That instrument contained an agreement, on the part of the mortgagors, not to raise any more money on their said property; and gave a power of sale to the mortgagee in the event of their failing to pay the interest regularly, and the principal in three years; and to it was added a declaration by the Appellant that his co-proprietors, Messrs. *Morton & Bell*, were free to dispose of their three-fourths of the flour mill and bakery above mentioned.

In 1867 *John Bell* died, and *George Bishop Marshall* joined the firm, of which the style was changed to *T. B. Morton & Co.*

In 1868 *Petrocockino* died, and in 1869 his widow became the wife of the Appellant.

It does not very clearly appear on the record how upon the above changes in the firm of *Morton & Bell* and *T. B. Morton & Co.*, their share of the property in *Prinkipo* was dealt with. It would seem, however, that some interest in that share was assured to the estate of *Petrocockino*, since, under the arrangement for working the mill which subsisted between the 15th of March, 1869, and the 30th of March, 1872, the Appellant was to receive one half instead of one-fourth of the profits, on the terms of making over half of what he so received to Mrs. *E. Petrocockino*. But whatever may have been the interest of *Petrocockino's* estate, it was necessarily subject to the mortgage of 1863, to which he was a party.

In 1873, *Thomas Browne Morton* and *George Bishop Marshall*, the then partners in *T. B. Morton & Co.*, became insolvent, and in the month of August of that year made an arrangement for the liquidation of their affairs under Part VI. of the *Bankruptcy Act*, 1869, which then regulated the proceedings of the Consular Court as a Court of Bankruptcy; and the Respondent, *Edward La Fontaine*, was duly appointed the trustee under that liquidation. The interest of the insolvents in the *Prinkipo* property, so far as it was property divisible amongst their creditors, accordingly became vested in the Respondent, whose duty it was to realize it for the benefit of the estate, but the three-fourths shares of the

property which originally belonged to the firm of *Morton & Bell*, being subject to the mortgage of 1863, on which £2000 were still due, he could not sell more than the equity of redemption in those shares except with the concurrence of the mortgagee. Nor could any question that might exist or arise between the insolvents and their co-proprietor, the Appellant, be determined except in a suit against him properly framed for that purpose. It is necessary to state these elementary principles in order to consider and test the regularity of the proceedings which were actually had.

The first proceeding is that of the 23rd of April, 1874. It is called a petition, but it does not so much resemble a petition in bankruptcy as a suit brought by the trustee in liquidation against *Ellen Jani Pitts*, as sole Defendant. After stating that she became the legal owner of the property only in order to comply with the Ottoman law as it previously existed, and that the equitable ownership was in the Appellant and in the insolvents, in the proportions of one fourth and three fourths, and that the three fourths were subject to the mortgage to *Homére*, and further stating the title of the Plaintiff as trustee under the liquidation, and that it was necessary that the three-fourths share belonging to the insolvents should be sold and the mortgage discharged, in order that the balance remaining due should be paid over to the general creditors of the estate of *T. B. Morton & Co.*, it prayed that the Defendant might be decreed to sell the said land, flour mill, and bakery under the supervision of the Court, and to pay into Court three fourths of the proceeds arising from the sale thereof,—clearly contemplating a compulsory sale by her of the whole of the joint property, though she might be allowed to retain one fourth of the price in trust for the Appellant. On being served with this petition Mrs. *Pitts* took objection to the jurisdiction of the Court, and obtained, on the 8th of May, 1874, a rule to shew cause why the petition should not be dismissed, with costs, for want of jurisdiction of the Court over the subject matter, the same being real or landed property in the Empire of *Turkey*. On the 10th of May, 1874, this rule was discharged, with costs, such costs being, with the consent of the parties, fixed at seven guineas.

The grounds on which this order was made by the late Sir

J. C. 1880 PITTS v. LA FONTAINE.

Philip Francis, the then Judge of the Consular Court, appear in the Supplemental Record. If the Defendant had remained Mrs. *Petrocockino*, it seems pretty clear that the Court would have no jurisdiction over either her or the land; but by her intermarriage with the Appellant she had become a British subject, and Sir *Philip* ruled that, though he might not be able to transfer the property, he could, by a decree *in personam* against the Defendant, order and compel her to sell it under the supervision of the Court.

The petition or suit afterwards came on for hearing on the 18th day of July, 1874, when the Court made the first of the orders impeached. This, in terms, ordered the Defendant, *Ellen Jani Pitts*, to sell the land, flour mill, and bakery known as the *Prinkipo* steam flour mill, and in order thereto, to publish the advertisement set forth in the order, for the sale of the property by public auction, unless previously disposed of by private contract, referring to the Plaintiff for further particulars. It further ordered that all the purchase-money arising from the sale of the said property should be paid into Court, and that the said *Ellen Jani Pitts* should pay such costs as should, on taxation, be allowed.

The other and subsequent orders against which the Appellant sought and obtained Her Majesty's leave to appeal are those of the 27th March, the 13th, the 17th, and the 28th of June, the 2nd and the 15th of July, the 13th and 27th of August, the 25th of October, the 23rd of November, the 3rd and 16th of December, all in the year 1878, and the 7th of January and 5th of February in the year 1879.

It should, however, be observed that before the earliest of these latter orders was made certain other proceedings took place, in consequence of a claim to the three-fourth shares in question which the daughters of *Petrocockino* had sought to establish in the Turkish Court of the Sheik-ul-Islam. They seem to have obtained a decree of that Court in their favour in the month of July, 1874, and the object of the proceedings in question, which, for the most part, consisted of correspondence between the Consular and Turkish authorities, containing threats of diplomatic pressure, was to induce the latter to give effect to the order of the 18th of July, 1874, notwithstanding the decree of the Court of the Sheik-ul-Islam.

No sale was, however, made by the Defendant under the order of July, 1874. It appears that sometime in the year 1876, a sale by private contract of only the three-fourth shares of the *Prinkipo* property which were comprised in the mortgage was made by the Respondent, as trustee under the liquidation, with the sanction of the Court, to one *Constantinidis* as the agent acting on behalf of the mortgagee; and the main object of the subsequent proceedings, now under appeal, was to put him, as the purchaser under that contract, into full possession of the property at *Prinkipo*. Nor do their Lordships think it necessary to say more of this claim of the daughters of *Petrocockino*, who, not being parties to the proceedings in the Consular Court or to this appeal, cannot be affected thereby, than that their rights, whatever they may have been, were apparently subject to those of the mortgagee.

The order of the 27th of March, 1878, was made on the application of the Respondent. It was in terms an order for the ejection on the 30th of March of the Defendant, Mrs. *Pitts*, from "the *Prinkipo* steam flour mill" (meaning apparently the whole of the joint property), condemning her in the costs of and incident to the application.

The order of the 13th of June, 1878, was also made on the Respondent's application, and on an affidavit made by him that though certain formalities had been gone through, with the object of giving possession of three-fourths of the mill to *Constantinidis* in compliance with Turkish law, the Appellant was still, *de facto*, in possession. The order was that the mill be closed.

Both these orders were made *ex parte*, though ordered to be served on the Defendant.

The last order seems to have brought the Appellant as a party actor into Court; and on the 27th of June he moved for a rule to shew cause why it should not be set aside.

The grounds of his application, as shewn by his affidavit, were that he was the owner of one fourth of the mill; that *Constantinidis* had purchased the other three fourths, obtained possession of the same, and signed a protocol to that effect; that nevertheless the Respondent, the trustee, had applied for and obtained the order for closing the mill; that the Appellant was the sole owner of two ovens attached to the mill; that he and

J. C. 1880 PITTS v. LA FONTAINE.

his partner, one *Xenachi Xenos*, were under contract to supply the Russian troops at *San Stefano* with bread; that they had large quantities of flour and other property in the mill, and would be seriously injured by the closing of it; that *Constantinidis* had attempted to close the mill, but that the Turkish authorities, who seem to have taken a correct view of the rights of the parties, had, on the protest of the Appellant, refused to do so, declaring that regular proceedings should be taken by *Constantinidis*. Upon these facts, as appears by the Judge's note, the Appellant insisted that the Respondent, as trustee under the liquidation, had ceased to have any interest in the mill, or a *locus standi* for asking for the order to close it. The rule was refused; and it appears that on the 20th of June the Consular Court communicated its order of the 13th of June, 1878, to the Turkish authorities, and requested them to give effect to it by closing the mill. The mill was accordingly closed, and the seals of the Court put upon it.

On the 28th of June, 1878, the Appellant moved the Consular Court for leave to appeal to Her Majesty in Council against the order of the 13th of June, 1878; but his application was refused, on the ground, as appears by the Judge's note, that the order in question was a necessary consequence of Sir *Philip Francis'* order of July, 1874.

On the 2nd of July, 1878, the Appellant moved that the moveable property then under seal at the flour mill should be let free at the disposal of the proprietors; that the two ovens, which were not, as he contended, included in the order for closing the mill, should be let open; that a proper person should be appointed to take care of the engine and machinery of the mill; and that he should be allowed to work the mill for a sufficient time in order to grind the wheat then lying there. The Court refused to grant even a rule to shew cause.

The next order under appeal is that of the 15th of July, 1878, and on that occasion the Appellant and the Respondent seem to have been for the first time brought in presence of each other. On the 10th of July, the Appellant moved, on an affidavit filed the day before, and setting forth the damage he was likely to sustain, that proceedings in the matter should be suspended, and

that the mill and ovens and separate buildings should be re-opened until security for such damages should be given to the satisfaction of the Court. On this, the Court granted the rule to shew cause, of the 11th of July, which is set out in the Record. On the 15th of July, 1878, the Respondent put in an affidavit, in which he admitted that he had received from *Constantinidis* the whole of the balance of the purchase-money which remained due after the satisfaction of the mortgage, and shewed cause against the rule. The Court, on the same day, made an order which, after erroneously stating that the rule had been obtained by the Defendant, *Ellen Jani Pitts*, discharged it, and ordered her to pay the costs of a proceeding to which, in fact, she was no party. On the same day, this order was communicated to the Turkish authorities, who were informed that it had that day been decided that the closing of the mill had been properly and legally effected. On the 19th of July, the Respondent obtained an order that certain persons named by the Court should make an inventory of the moveable property contained in the mill, and report upon the condition of the machinery. They made their report on the 26th of July, from which it appears that the value of the goods was about 3090 Turkish lires.

In August the Appellant renewed his attempt to get the mill re-opened, and, on the 6th of August, 1878, obtained a rule to shew cause why it should not be re-opened, the whole purchase-money of the three-fourths having been paid. On the 13th of August that rule was discharged, the costs on this occasion being ordered to be paid by the Appellant. On this occasion, too, the counsel for the Respondent contended that the Appellant, who was seeking to protect his property, had no *locus standi*, because he was not a party to the suit.

Thus far, the mill seems to have been, in a manner, placed *in custodiâ legis*, having been closed and sealed up under the orders of the Consular Court, carried into effect at the instance of that Court with the aid of the Turkish authorities. This state of things, however unjust and irregular as regarded the Appellant, does not appear to have satisfied the Respondent, who next proceeded to obtain exclusive possession of the whole of the joint property for the purchaser of the three-fourths, viz., *Constantinidis*.

J. C. 1880 PITTS v. LA FONTAINE.

On the 22nd of August the Respondent moved that, the purchase-money having been wholly paid, the keys of the mill, which were in the hands of an officer of the Court, should be delivered to *Constantinidis* on behalf of *Paul Homére*, the owner of three-fourths of the mill; that the Defendant, Mrs. *Pitts*, should be ordered to remove the flour and other materials in the mill (which the Respondent, in his affidavit, said he concluded were claimed by the Appellant as his property), upon filing, within fourteen days, an affidavit stating that the said property belonged to her and her husband, and that he consented to such removal. The Court made an order to this effect; and added a direction that, in default of *Ellen Jani Pitts* removing the flour and other materials within fourteen days from the date of the order, the same should be sold by public auction, and the proceeds of the sale paid into Court to abide the further order of the Court. This order was made *ex parte*, but was directed to be served on the Defendant, *Ellen Jani Pitts*. On the 24th of August she filed an affidavit, stating that she had no further concern in the mill; that the flour and other materials directed to be removed belonged not to her, but to her husband and his partner, *Xenos*, and that she could not interfere with them.

The direction in the order for the sale of these materials, and the payment of the proceeds into Court, was apparently thought too strong even by the Respondent and his advisers, for on the 19th of September he obtained an order that that part of the order of the 22nd of August should be discharged.

In the meantime however he had, on the 18th of September, given notice to the Appellant that unless he removed his goods they would be put into the public street at his risk and peril.

This notice led to various proceedings in the way of protest, correspondence, &c. In the course of these a report as to the condition of and damage done to the goods stored in the mill was made by surveyors appointed by the Consular Court, and served on the Appellant and Respondent, and the seals of the Court were about this time again put upon the mill, in consequence, it is said, of the refusal of *Constantinidis*, to whom the keys had been delivered, to open it. This led to the order of the 25th of October (the next of those under appeal), by which

the Court refused to grant the application of the Appellant for the re-opening of the mill, in order that proper care should be taken of the engine and goods stored therein. The ground of the refusal (as stated in the Supplemental Record) was that the Appellant "had disobeyed the order of the Court, and had not removed his goods from the premises as directed," a somewhat singular reason for keeping the mill sealed and closed against him.

On the 23rd of November the Court, on the application of the Respondent, granted a rule against the Defendant *Ellen Jani Pitts*, calling upon her to shew cause why the seals of the Court affixed on the *Prinkipo* flour mill should not be removed; why the Respondent should not be at liberty to remove the goods, not belonging to him, and then in the mill, into a warehouse at *Prinkipo*, unless the same should be removed by *Joseph Pitts*, the husband of the Defendant; and why the Respondent should not be at liberty to retain thirty tons of coal then in the mill to cover the expenses of such removal if made by him.

The Defendant on the 29th of November filed an affidavit disclaiming as before all interest in the mill or goods, or power in the matter of their removal; and on the 3rd of December the Court made an order absolute, whereby it ordered, first, that the seals should be removed forthwith, and full possession of the mill be given to *George Constantinidis* acting for *Paul Homére*; secondly, that unless the goods not belonging to the Plaintiff (the Respondent) and then in the mill should be removed by the Appellant within four days from the service of the order on the Defendant, the Respondent should be at liberty to remove the same into a warehouse at *Prinkipo*; and, thirdly, that the Defendant should pay the costs of and incident to the order. In supporting the rule *nisi*, the counsel for the Respondent for the first time put forward the pretension that the Appellant having been in possession of the whole mill for four years and more his clients had, according to the Turkish law, "the right to possession for their term of years."

On the 10th of December the Appellant obtained a rule to shew cause why the order of the 3rd of December, 1878, should not be set aside, so far as one-fourth of the mill, and the goods stored therein which belonged to him and his partner *Xenos*, were

J. C. 1880 PITTS v. LA FONTAINE.

concerned. But on the 16th of December the Respondent shewed cause against this rule, which was discharged with costs, the order of the 3rd of December being expressly confirmed by the court.

It appears by the declaration of *David de Castro*, filed in the Court on the 20th of December, 1878, that in pursuance of the order of the 3rd of December he, in concert with the Turkish authorities, had that day removed the seals of the Court, and given full possession of the mill, of the engine and machinery therein, and bakery to *Constantinidis*.

The remaining two orders relate exclusively to the ovens which the Appellant claimed as belonging to him exclusively. On the 7th of January he applied for a rule to shew cause why the two ovens at *Prinkipo*, in the locality called *Nizam*, forming a separate building from the *Prinkipo* flour mill, its bakery, and its ovens, of which possession had been given to *Constantinidis*, should not be forthwith returned to the Appellant. In the first instance the Judge of the Consular Court refused to grant the rule. He subsequently changed his mind, and communicated to the Appellant's counsel his intention to grant one. The Appellant said the rule he moved for had been refused, and declined to accept what was now offered. Nevertheless the Judge caused the rule *nisi* to be drawn up and sent to the Appellant, and after several adjournments finally discharged it, on the non-appearance of the Appellant, on the 5th of February, 1879. The result of the above proceedings seems to have been that *Constantinidis* obtained exclusive possession of the whole mill and premises, including the ovens, which the Appellant claims as his exclusive property.

Without dwelling upon the minor irregularities which might be pointed out in many of the above proceedings and orders, their Lordships have to observe that, in so far as they affected or purported to affect the one-fourth share of the Appellant, and his rights therein, or were directed to the end, in which they culminated, of expelling him from the mill, they are all open to the fatal objection that they were had and made in a suit to which he was not a party, and in which many of the issues which they purported to decide could not properly be raised or determined.

The only nominal parties to the suit were the trustee under the liquidation, as Plaintiff, and *Ellen Jani Pitts*, as sole Defendant.

Personally she had no interest in the suit. She was a bare trustee, in whom the whole of the joint property was nominally vested, in order to satisfy or evade the law of *Turkey*. The suit was defective in making her, even in that character, a Defendant without joining her husband, and if that irregularity be waived so far as her character as trustee is concerned, that waiver would not make her the representative of her husband *quoad* his beneficial interest in the joint property, or give the Court, in a suit so constituted, jurisdiction over it. In one instance his right to intervene for the protection of his interests seems to have been questioned by the Respondent on the ground that he was not a party to the suit. Again, to what was the trustee in liquidation entitled as Plaintiff in the suit? He had acquired the interest of the bankrupts in the property, and it was his duty to realize it for the benefit of the general creditors of the estate; but that interest being subject to the mortgage of 1863, he could not call upon the Court to sell even the three-fourth shares comprised in the mortgage in the absence and without the concurrence of the mortgagee. Nor could the Court, with the concurrence of the mortgagee, sell more than what was comprised in the mortgage.

If again it had power to compel the Defendant, by virtue of its jurisdiction over her personally, to do whatever might be necessary, under the Turkish law, to effect or give effect to such a sale, and to put the purchaser under it into possession, such possession would nevertheless be limited to an undivided share to the extent of three-fourths of the property, and, from the nature of the subject-matter, would not be exclusive. This done, the interest of the Respondent would cease. The Court had no power to sell the one-fourth share of the Appellant, or to eject him, if in actual possession, or his wife, as trustee of his one-fourth, from the mill. Any questions that might exist or arise between him and the new purchaser of the three-fourth shares, as to their respective rights in the joint property, would have to be determined in a suit between them properly framed and instituted in the proper *forum;* and, lastly, the Defendant, on a decree being made against her as trustee, would, according to the usual course of justice, be entitled to her costs, instead of being condemned to pay the costs of the proceeding against her.

J. C. 1880 PITTS v. LA FONTAINE.

On the face of it, the order of the 18th of July, 1874, sins against many of the principles just laid down. The petition on which it was founded prayed for a sale of the whole property, though it asked that only three-fourths of the price should be paid into Court. The order went further, and directed that the whole of the proceeds should be paid into Court, *i.e.*, that the property of a man not before the Court should be sold, and the proceeds of it paid into a Court which, in the matter of the bankruptcy, had not the semblance of jurisdiction over him. It was, apparently, made in the absence and without the concurrence of the mortgagee of the three-fourths of the property, and the Defendant (the Appellant's wife) was ordered to pay the costs of and incidental to the proceeding.

Some of these objections have, no doubt, since disappeared or become immaterial. It has already been stated that the sale was not made by the Defendant under the order in question; that it was made some time in 1876 by the trustee in liquidation by private contract, with the sanction of the Court; that it was a sale of three-fourth shares only, and was made to *Constantinidis* as the agent of the mortgagee *Homére*. Such a transaction may be taken to be equivalent to a sale by order of the Court, with the concurrence of the mortgagee, at which the latter was allowed to become the purchaser. The Appellant, therefore, has no substantial grounds for impeaching the sale, if so understood, and he has disclaimed any wish to disturb it. He retains, however, the right to impeach this first, as well as the subsequent proceedings, against which he has appealed, in so far as they have injuriously affected his rights and interests in the *Prinkipo* property, or purported to do so.

One of the subsequent orders, the effect of which has already been stated, may have been made before *Constantinidis* was put into even joint possession; the others were all made after that event. The formalities mentioned in the affidavit of the Respondent of the 13th of June, 1878, already referred to, are then said to have been gone through, in pursuance of the order of the 27th of March, 1878, and therefore after its date. This order of the 27th of March, 1878, is nevertheless open to the objection on the part of the Appellant, that, even if made before

such constructive possession was given, which seems doubtful, it is in terms an order for the ejection of the Defendant, *Ellen Jani Pitts*, from the *Prinkipo* flour mill generally, and consequently for her ejection from the one-fourth part, which, if in possession at all, she held for the Appellant.

All the remaining orders appealed against, whether for the closing of the mill, and putting the whole property *in custodiâ legis*, or for giving exclusive possession of it to *Constantinidis*, seem to their Lordships to have been improperly made, either at the instance of the Plaintiff (the Respondent), in violation of the rights of the Appellant, or in disregard of his right to appeal from and claim relief against such orders, on the ground that they injuriously affected his interests. On the delivery of possession, actual or constructive, to *Constantinidis*, the interest of the trustee under the liquidation in the property presumably ceased. Some passages in the affidavits of the Respondent, or in the notes of the arguments of his counsel, indeed seem to assume that under the contract of sale he was under an obligation to put *Constantinidis* into actual possession of the whole mill. Such an obligation, however, if it existed, was one which he had no power to incur, or to perform, in derogation of the rights of the Appellant. Nor can it be assumed in the absence of the contract of sale, which is not to be found in the record, that such an obligation had been really incurred. It has been before stated that any questions which subsisted or might arise between *Constantinidis* and the Appellant, as joint owners of the mill and other property, ought to have been litigated and determined between them in the manner already indicated. That there were questions of this kind appears abundantly on the record. Such, for instance, were on the one hand the claim of the Appellant to an exclusive property in the two ovens and the separate building in the locality called *Nizam*, and on the other the suggested right of *Constantinidis* under the Turkish law to the exclusive use and possession of the mill during a term of years. It appears to their Lordships that *Constantinidis*, instead of litigating these questions fairly, has sought to get them indirectly determined in his favour, by the proceedings taken in the Consular Court in the name and at the instance of the Respondent; that the Respondent has, from some motive or another,

J. C. 1880 PITTS v. LA FONTAINE

become his instrument, and lent himself to that course of action; and that the Court has improperly sanctioned it by the orders in question.

That the Appellant has suffered grievous wrong by reason of these irregular proceedings is unquestionable. He has been wrongfully put out of possession of his property, in a country where a British subject is likely to encounter peculiar difficulties in regaining the possession of which he has been unjustly deprived. In addition to this, it is clear that his moveable property (the flour, &c.) stored in the mill has been greatly damaged. It is unhappily impossible for their Lordships, in the peculiar circumstances of this case and on this appeal, to give him full and adequate relief. They cannot, having regard to the power of the Turkish authorities over the land, and to the fact that *Constantinidis* is not subject to the jurisdiction of the British Consular Court, absolutely direct a restoration of possession, still less can they deal with the question of damage done to the moveable property. They are, however, bound to do what they can, and the order which they propose to recommend Her Majesty to make, is to the following effect, viz.:—

Declare that the orders of the 18th of July, 1874, and the 27th of March, 1878, are void and of no effect against the Appellant, and order that the same be set aside in so far as they affect or purport to affect his interest in the *Prinkipo* property, or direct the payment of costs by the Defendant *Ellen Jani Pitts*, his wife.

Declare that all the orders under appeal subsequent to the orders of the 27th of March, 1878, were irregularly and improperly made, and order the same to be reversed and set aside.

Declare that the Appellant, or his wife *Ellen Jani Pitts* as trustee for him, ought to be restored to the possession of one-fourth share of the *Prinkipo* property, but without prejudice to any of the questions between him and *Constantinidis*, as the purchaser of the other three-fourth shares of the said property, or any person claiming by virtue of the sale to such purchaser, including the claim of the Appellant to the exclusive ownership of the two ovens in the locality called *Nizam*, mentioned in the rule *nisi* of the 7th of January, 1879; and order that the Consular

Court do take all such proceedings as are within its jurisdiction, in order to effect such restoration of possession.

Order that all costs which may have been paid under the orders under appeal, either by the Appellant or by the Defendant *Ellen Jani Pitts*, his wife, be repaid to him.

Declare that the Appellant is to be at liberty to take such proceedings as he may be advised against the Respondent, or any other person, to obtain restoration of his property above mentioned; and also in respect of the damage done to his moveable property stored in the mill, by reason of the closing of the said mill, or the subsequent removal of such property, or otherwise sustained by him under any of the orders under appeal.

Order the Respondent to pay to the Appellant all such costs as were incurred in the Consular Court by him, or his wife (the Defendant *Ellen Jani Pitts*), of and incidental to all the orders under appeal, or of opposing the rules upon which such orders were made, except the costs of the rule of the 7th of January, 1879, and of the order of the 5th of February, 1879, made thereon; such costs to be taxed by the Consular Court. And also order that the Respondent do pay the costs of this appeal.

Solicitors for Appellant: *Willoughby & Cox.*
Solicitor for Respondent: *T. Russel Kent.*

[HOUSE OF LORDS.]

H. L. (E.) 1880 *May* 28.

THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT . . . . } APPELLANTS;

AND

SIR R. HILL, WILLIAM LUND, AND A. D. FRIPP . . . . . } RESPONDENTS.

Appeal for Costs.

An appeal must not be brought for costs, or in relation to costs. But an appeal against an order which imposes, as a condition to having a new trial, the payment, within a certain time, of the costs of the first trial does not fall within that principle.

The competency of the appeal being established, the costs of the cause were reserved till the hearing of the case itself.

Suggestion as to printing the evidence where a point of law has, previously, to be considered.

THIS was an appeal against an order of the Court of Appeal made under the following circumstances:—The present Respondents were owners of different pieces of land in the parish of *Hampstead*, in the county of *Middlesex*. The Appellants were the managers of an institution for the reception of small-pox patients, and in 1868 became the owners in fee of a plot of land in that parish contiguous to the lands of the Respondents. In the course of the year 1870, the Appellants erected on their land some temporary buildings, which, in December, 1870, they opened as a hospital for small-pox patients. They continued to use the hospital for that purpose till July, 1872. In 1876 they began erecting some permanent buildings for the same purpose. In January, 1877, the Respondents joined in bringing an action, alleging that they, their families, and their tenants, had suffered personal injury and pecuniary loss from the acts of the Defendants in the action, the now Appellants, (against whom negligence in the management of the hospital was also alleged,) and sought for damages, and also for an injunction to restrain the Defendants from using the land and buildings for the purpose of a small-pox hospital. The defence was that the Defendants had been incorporated under the *Metro-*

politan Poor Act, 1867; that in May, 1867, the Poor Law Board directed the formation of a Metropolitan Asylum District for the relief of poor persons suffering from fever or small-pox, and constituted a board of management for the purposes of carrying the order into effect; that the parish of *Hampstead* was within that district, and that what the Defendants had done had been done in pursuance of that order, and of the powers lawfully vested in them. They also denied the facts set forth in the Plaintiffs' statement of claim as having arisen from what had been so done, and they denied that the hospital was a nuisance.

The cause came on for trial before Mr. Baron *Pollock* and a special jury. His Lordship left five questions to the jury, all of which were, so far as the hospital and the mode of bringing patients to the hospital were concerned, answered unfavourably for the Defendants, but as to everything done in the internal arrangements of the hospital the jury gave great praise to everybody concerned. On the 28th of January, 1879, his Lordship pronounced judgment for the Plaintiffs, granting the injunction. A motion was made in the Queen's Bench to reverse this judgment, and to enter judgment for the Defendants, and dissolve the injunction; and also for a new trial. On the 22nd of May, the Queen's Bench Division made, at the instance of the Defendants, an interlocutory order granting a new trial, and dissolving the injunction, but directed that the costs of the first trial should abide the result of the new trial. The Plaintiffs appealed against this order of the Queen's Bench. On the 18th of December, 1879, the Court of Appeal made an order "that the Plaintiffs' appeal herein be dismissed if, within two months, the Defendants elect to pay, and if, within fourteen days after completion of taxation, the Defendants pay, the costs of the former trial, except in so far as such costs were increased by the Plaintiffs' contention that the Defendants had been guilty of negligence in the management of the hospital; and that all other costs be costs in the cause."

"And it is farther ordered that if the Defendants do not so elect, and pay such taxed costs within the time before-mentioned, then that the Plaintiffs' appeal herein be allowed with costs."

The managers of the hospital appealed against this qualified judgment of the Court of Appeal. The Plaintiffs contended that

3 2 R 2

Appeal affirmed 6 Apl 1880. H.L.

H. L. (E.) 1880

METROPOLITAN ASYLUM DISTRICT v. HILL.

the appeal was incompetent, as it was in effect only an appeal as to costs.

The Solicitor-General (Sir *F. Herschell*), (Mr. *Bompas*, Q.C., and Mr. *Finlay*, were with him), was heard on the part of the Plaintiffs in support of the objection to competency.

Sir *John Holker*, Q.C., and Mr. *C. H. Anderson*, appeared for the Defendants to maintain the competency of the appeal, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the objection to the competency of this appeal has been clearly presented to your Lordships by the learned counsel; but, I believe, you do not think it necessary to call upon the other side for an answer. The rule, subject to certain exceptions, is established, that an appeal is not to be allowed in respect of costs only; which means that when the merits of a question have been determined, and when a Court has thought fit to give or refuse costs, in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money but also of judicial time, for the mere purpose of reviewing that discretion. It may be doubtful whether that rule does not in some cases, when costs are very large, practically operate so as to inflict some injustice; but, within the limits within which the rule is properly to be confined, I assume that your Lordships would not be disposed to depart from it.

But it is a rule not to be extended to cases which do not properly fall within its scope; and I think that the present case does not fall within it. In this case the Court of first instance granted a new trial on the ground that the findings of the jury upon the evidence were not satisfactory. As part of that order, it reserved the costs. An appeal from that order was taken to the Court of Appeal, the object of which was to discharge the order for the new trial. The Court of Appeal conditionally discharged the order

for the new trial, and in the alternative conditionally dismissed the appeal. The present Appellants say that they were entitled to retain the order which they had obtained from the Court of first instance, unclogged and unfettered by conditions; and that the appeal, of which the object was to discharge that order altogether, ought to have been unconditionally dismissed.

On principle it appears to me that such an appeal is competent. A condition imposing upon one party or another, as the price of an order, which is to be made, or permitted to stand, in his favour, some election to be made by him as to the payment of costs, does not appear to me to bring it within the rule applying to an appeal for costs only. I think, therefore, that this present petition seeking to have the appeal stopped for incompetency must be dismissed; but inasmuch as it may turn out upon the hearing of the appeal that the order of the Court of Appeal was perfectly right, and that the terms imposed were proper terms, I submit to your Lordships that in dismissing this petition you will not now dispose of the costs occasioned by it, but will reserve them to be dealt with when the appeal is heard.

LORD BLACKBURN:—

My Lords, I also think that, without in the slightest degree wishing to break in upon the rule which says that appeals shall not be brought merely for costs, or in relation to costs, this case does not fall within that principle. Here, in fact, the Queen's Bench Division, having the question before it whether there should be a new trial or not, made an order for the new trial with this; that as to the costs of the former trial it was to be decided hereafter who should pay them. Consequently in effect the Court said that it was right to have a new trial, but to consider afterwards, according to the event of the new trial, whether the costs of the former trial were to be borne by the one side or by the other. That might be quite right or it might be quite wrong. The Court of Appeal thought it was quite right to make an order for a new trial, but altered the condition. Instead of leaving it to be the condition that the costs should, after the event of the new trial had been decided, be reconsidered and disposed of, the Appeal Court ordered at once:—"New trial there is to be if the

H. L. (E.) 1880 — METROPOLITAN ASYLUM DISTRICT v. HILL.

Defendants will now within a limited time elect to pay, and pay those costs; if not, there shall be no new trial at all." That might be perfectly right or it might be wrong, but that clearly was attaching a condition to the new trial which had not been attached to it by the Court below. I apprehend that when the case comes to be heard at the bar of this House, your Lordships may possibly come to the conclusion that there ought to be a new trial absolute and simple, without any condition at all, or it may be that you will think it right for there to be a new trial with the condition which the Queen's Bench Division imposed, or with the condition which the Court of Appeal imposed, or it may possibly be that you will be of opinion that there should be a new trial with some other condition different from either of the conditions which have been hitherto imposed.

Now, I think, upon that question as to what condition (if any) should be imposed, there should be an appeal. I quite agree with what my noble and learned friend the Lord Chancellor has already said, that it is not because the condition involves the payment of costs, that, therefore, the question whether there is to be a condition or not, is to be considered a mere dispute about costs. I think that is a fallacy in the use of language; and consequently I perfectly agree in the motion made, and think it quite right and reasonable that the costs of this particular application should not be disposed of until we know what are the merits of the whole case.

LORD WATSON:—

My Lords, I also quite agree with the opinions which have been just expressed. I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule is limited to the case where the whole merits of the action or cause have been determined, and where the Judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case; because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may,

to a very great extent, depend upon the mode in which it has been conducted throughout by the parties. Accordingly, I think it would be out of the question to require that the Court of Appeal should investigate not only the merits of the cause but the whole of the proceedings in the cause *ab initio*, for the purpose of ascertaining whether the discretion of the Court below had been rightly or wrongly exercised.

But, my Lords, the question here, although in one sense it may be called a question of costs, has not been determined by the Court of Appeal at all upon any consideration of the merits of the action; for it has not yet been determined whether the Appellants are in the right or in the wrong. In point of fact the Court has resorted to this as a convenient way of imposing a condition upon the right to the new trial which has been granted; and, inasmuch as an order for a new trial coupled with any other condition but that of paying costs, would be an appealable order, I have no hesitation in coming to the conclusion that we cannot refuse to entertain this appeal simply because this particular mode of imposing and enforcing a condition has been resorted to.

Ordered that the competency of the appeal be sustained, and that the costs be reserved until the hearing of the appeal.

THE LORD CHANCELLOR, noticing a statement that there was involved in the case a question of law which might decide the result of the appeal, said the House would be glad if the learned counsel on both sides would come to an arrangement to postpone the printing of the voluminous evidence till that question had been determined.

Lords' Journals, 28th May, 1880.

Solicitors for Appellants: *Few & Co.*
Solicitors for Respondents: *Bischoff, Bompas, Bischoff, & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1880 *June* 1.

ANNE THEOPHILA CARMICHAEL, CATHERINE G. AND JANE T. CARMICHAEL . . . . . } APPELLANTS;

AND

ELIZABETH GEE (WIDOW), ZARA HARRIET GEE, AND SAMUEL MAHOOD AND OTHERS . . . . . } RESPONDENTS.

Will—Annuity—Corpus of the Estate—Residue.

A testator appointed his wife and two other persons his trustees and executors—he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real and personal estate, and to stand possessed of the money arising therefrom in trust to invest the same, and set apart a sufficient portion of such investments as will produce the annuity of £1200, "which I bequeath to my wife for her life," payable on the usual quarter days, "the first payment to be made on the first of such days as shall happen after my decease, such annuity, in case of my wife's second marriage, to be reduced to the annual sum of £150," and subject to such investment to set apart £5000 for his daughter *Z.* "As to the entire residue of my trust estate, and as to that part set apart in favour of my wife, and as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage" in trust for three grandchildren:—

Held, affirming the decision of the Court of Appeal, that this was the bequest of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted (as might be the case during the whole of her life), the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1200 a year, the deficiency was to be made good out of the corpus.

May v. *Bennett* (1) and *Wright* v. *Callender* (2) adopted.

APPEAL from an order of the Court of Appeal which had reversed a previous order of Vice-Chancellor *Hall* in an administration suit of *Gee* v. *Mahood* (3).

Robert Gee, by a will dated the 5th of November, 1868, appointed his then wife, *Elizabeth Gee* (now Respondent), the Rev. *W. P. Trevelyan*, and *Samuel Mahood*, his executrix and executors

(1) 1 Russ. 370. (2) 2 De G. M. & G. 652.
(3) 9 Ch. D. 151.

and trustees, and he gave by his will some specific and pecuniary legacies, and an annuity of £20 to one *M. T. Dribble*, for her life, payable quarterly. He then proceeded as follows:—"I give, devise, appoint, and bequeath all other the real estate to which I shall be entitled at my decease—and I bequeath the residue of my personal estate to which I shall be entitled, to my said wife and *W. P. T.* and *Samuel Mahood*, and the survivor and survivors of them, their heirs, executors, &c., according to the nature and quality thereof respectively: Upon trust that my said wife and *W. P. T.* and *S. M.*, their heirs, executors, &c., do and shall from time to time, and at all times hereafter, receive and take the rents, &c., upon the trusts hereinafter declared." The first trust was to grant building leases not exceeding 1000 years "of all or any part of my said real estate," and, when they should think fit, "to sell and dispose of all my real and personal estate," or parts thereof, as therein mentioned. And they were to stand possessed "of the moneys arising from the sales," in trust to invest in the stocks of *Great Britain* or *India*, or on mortgages of copyhold or freehold estates, "with liberty for the trustees with the consent in writing of my said wife during her life," to vary the investments. "And upon farther trust to set apart a sufficient portion of such investments as will produce the annuity of £1200 a year, which I bequeath to my said wife for her life, payable quarterly on" the usual quarter days, "the first payment to be made and become due on the first of such days as shall happen after my decease, such annuity, in case of my said wife's second marriage, to be reduced to the annual sum of £150 [which was to be paid as the other would have been]. . . . And, subject to such investment in favour of my said wife, in trust to set apart £5000 other part thereof for my dear daughter *Zara* on her attainment to the age of twenty-one years, or marriage, which shall first happen, to be settled on her and her children as the trustees shall, by deed, declare. And as to the entire residue of my said trust estate, and as to that part thereof set apart in favour of my said wife, after her death, and as to such part thereof as shall be no longer required to be set aside, in consequence of her second marriage, in trust as to one moiety for all and every the three children of my late dear daughter *Jane Theophila Carmichael*, in equal shares."

H. L. (E.) 1880 CARMICHAEL v. GEE.

The other moiety was to go to *Zara*. If the children of *Theophila* should die before a vested interest was acquired, the whole was to go to his daughter *Zara*. And no sale was to be made during the life of his wife, without her previous consent in writing; but the unsold real estate and the outstanding personal estate were to be subject to the trusts thereinbefore contained concerning the moneys and funds, and the rents and produce thereof were "to be deemed annual income for the purposes of such trusts," and the real estate was to be transmissible as personal estate under the ultimate trusts thereinbefore contained.

The testator died on the 6th of July, 1869, and the will was proved by the widow and *Samuel Mahood*. No change had been made in the investments. The widow had created certain incumbrances on her interest. The estate of the testator proved to be insufficient to meet the widow's annuity. No part of the estate, or of his investments in stocks, &c., had been set aside for that purpose. An administration suit was instituted (*Gee* v. *Mahood*), and in that suit *Elizabeth Gee*, the widow, presented on the 1st of July, 1876, a petition asking, among other things, to have the arrears of the annuity raised out of the corpus of the estate. The cause came on, for hearing and farther consideration, before Vice-Chancellor *Hall*, who declared that *Elizabeth Gee* was not entitled to have recourse to the corpus of the estate, nor to the income of subsequent years, to provide for the deficiency in former years of her annuity of £1200 (1). On appeal this order was varied, and it was declared that *Elizabeth Gee* was entitled to have recourse to the corpus of the estate, and to the income of subsequent years, to supply the deficiency of former years (2). The incumbrancers on the widow's interest in the estate were, as such, parties to the suit, and had joined in the appeal against the Vice-Chancellor's order, and were now Respondents with the widow to maintain the decision of the Court of Appeal. The three children of *Theophila* appealed against the decision of that Court.

Mr. *W. Pearson*, Q.C., and Mr. *Vaughan Hawkins*, for the Appellants:—

The will here has been misconstrued in the Court of Appeal,

(1) 9 Ch. D. 151. (2) 11 Ch. D. 891.

and a benefit has been conferred on the widow which was never intended by the testator to be given to her. He believed that the income of his property would be sufficient to satisfy her annuity, and he gave her that income, but he never meant that she should come upon the corpus of the estate, and so absolutely take away all provision for the children of his daughter *Theophila*. The gift of £1200 a year was not an indefeasible gift of an annuity of that amount. It might, on a second marriage, be cut down to £150, and it was directed to come out of investments which, of course, might from time to time vary in productiveness. The testator believed that those investments would be sufficient to satisfy the annuity to the wife, and to provide a sum of money for his daughter *Zara*, and therefore could not have meant that that provision for *Zara* should be liable to be wholly defeated, by the corpus of the estate being rendered liable to make good the deficiencies of the investments. There was not an expression in the will which shewed that the investments themselves were to be applied in that way, and the general purport of the will was opposed to such a supposition. The testator had made all his dispositions on the assumption that the income from the investments would be sufficient to provide for the annuity, and it was not because it turned out that he was mistaken as to the value of his property, that the general scheme of his will was to be defeated, and his surviving daughter and the children of his other daughter were to be left unprovided for, in order to satisfy the wife's life interest alone. The intention of the testator was plain and was plainly expressed, and being so, ought to decide the case. The authorities too were clear upon the subject. In *Baker* v. *Baker* (1), in a will almost exactly like this, it was held that the widow was not entitled to have the deficiency of the annual income made good out of the corpus. And the question put by the Lord Chancellor there applied exactly to this case, namely, how would the corpus have been affected by every deficiency if the money had, as might have been the case, been lent out on mortgage? *Wright* v. *Callender* (2), in which a different result was arrived at, was distinguishable from the present in the form of the trust, which was a specific direction to pay the weekly amount to the son out of

(1) 6 H. L. C. 616. (2) 2 De G. M. & G. 652.

491

H. L. (E.) 1880 CARMICHAEL v. GEE.

the general estate. Besides which it was to be remembered that *Wright* v. *Callender* (1) was decided before *Baker* v. *Baker* (2), where *Wright* v. *Callender* (1) was noticed, and was expressly distinguished from the case then under consideration. It was a gift of income to be paid at all events. *Tarbottom* v. *Earle* (3) favours the construction now contended for.

Birch v. *Sherratt* (4) was a case where the residue was to be subject to the payment of the annuity, and "from and after the payment of the annual sum of £100, and subject thereto," the trustees were to stand possessed of the investments for other purposes, which made the payment of the annual sum the primary object of the will; here there was nothing of the kind.

In a case like this, where there was a general deficiency, the principle was that there should be a general abatement: *Page* v. *Leapingwell* (5); not that specific legatees should alone be sacrificed in order to make good a particular life interest. As in *Baker* v. *Baker* (2) it was "apparent from the language of the will that the testator intended that the fund should be continued in its integrity during the life of the annuitant, and in that state should go over." The real question is whether what is given is given as an annuity to be paid at all events out of the general estate, or is the interest of a particular fund devoted to that special purpose? It is submitted that in this case the interest of a particular fund is all that the testator intended to give. In *Miller* v. *Huddleston* (6), the annuities were held not to be payable out of the corpus, but, there being a deficiency, all the interests were held to be affected rateably.

Foster v. *Smith* (7) carried out the principles now contended for. There the devise was of real estate in trust to receive the rent, &c., and thereout to pay to the testator's widow an annuity, and from and after her death to convey the estates to the testator's three sisters. The Vice-Chancellor had held that a deficiency might be made good out of the corpus, but the Lord Chancellor *Lyndhurst*, reversing that decision, held that the annuity was a

(1) 2 De G. M. & G. 652.
(2) 6 H. L. C. 616. 4 Jur (N.S.) 491
(3) 11 W. R. 680.
(4) Law Rep. 2 Ch. 644.
(5) 18 Ves. 463.
(6) 3 Macn. & G. 513; 21 L. J. (Ch.) 1.
(7) 1 Ph. 629; 15 L. J. (Ch.) 183.

charge only on the rents which had accrued during the life of the widow. There was nothing in this will which made the annuity payable at all events, so as to defeat the gifts intended by the testator for the benefit of his children.

Mr. *Graham Hastings*, Q.C., and Mr. *Warmington*, appeared for the widow, and Mr. *Farwell*, for the incumbrancers, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, this case has been very ably argued, but your Lordships, I believe, do not think it necessary to hear the counsel in support of the judgment appealed from. Your Lordships, I believe, are all agreed in thinking that that judgment is right.

The question may be stated very nearly in the terms used by Lord *Gifford* in the case of *May* v. *Bennett* (1). It is, "whether the bequest in favour of the widow is to be considered as a bequest of an annuity, or as a bequest of the income" (I interpolate the words 'or part of the income') "of a sum of money, which is directed to be set apart." It appears to me to be reasonably clear, upon the will, that it is the bequest of an annuity, and of an annuity not so restricted or limited as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime.

I do not think that the early part of the will, which precedes the trust, is of any importance in the case. In that portion of the will the testator, as he has himself said, appears to have been fulfilling what he considered a moral obligation, to dispose, probably in a way agreed upon between himself and his wife, of the fortune which he had received, in right of his wife, since their marriage. He treats that part of the will as equivalent to the restoration of her fortune. It appears to me that we may set that entirely aside; and, so doing, we come to the trust of his whole estate, after that part which he received from his wife has been so taken out and disposed of.

The particular order in which he declares his will concerning that trust estate is not, I think, to be regarded as affording any

(1) 1 Russ. 370.

H. L. (E.) 1880

CARMICHAEL v. GEE.

Lord Selborne, L.C.

clue to the effect of the will upon the point now in controversy. The testator was constituting a general trust of all his real and personal estate; and nothing was more natural, than that clauses of administration and management should immediately follow the constitution of that trust.

Towards the end of those clauses, which I have called clauses of administration and management, occurs the direction to invest and set apart out of the estate, when converted, a sufficient sum for the purpose of paying the annuity now in question. But, my Lords, although it is in this way that the annuity is first mentioned, it appears to me to be reasonably clear that you can disengage from that context a clear gift of an annuity; which annuity was not, in the mind of the testator, and in truth could not have been, dependent upon the fulfilment of the course of administration up to that point, as a condition precedent to the vesting of the annuity itself.

The words in which the testator first mentions the annuity are these (I do not read those about the investment): "The annuity of £1200 a year which" (that is, "which annuity") "I bequeath to my said wife for her life, payable quarterly on every 25th day of March, 24th day of June, 29th day of September, and 25th day of December; the first payment to be made and become due on the first of such days as shall happen after my decease." Then he provides, that such annuity is to be reduced in the case of his wife's second marriage to the annual sum of £150 instead of £1200; and he directs how that reduced annuity is to be paid.

In my opinion, the true effect of that portion of the will is precisely, and to all intents and purposes, the same as if he had said, disengaged from anything as to investment: "I bequeath to my wife an annuity of £1200 a year;" followed by the other directions, which I have read to your Lordships.

The fact that this annuity was to be paid quarterly, and that the first quarterly payment was to be made and become due on the first of the days mentioned which should happen after the testator's decease, proves conclusively that the gift of the annuity, and the vesting of the title of the widow, were, in his mind, independent of the execution of those preliminary trusts in the course of administration, of which the final result was to be an invest-

ment for the purpose of that annuity. Looking farther into the will, we see that he also contemplated, and made provision to the effect, that the sale of the real estate, and the getting in of the personalty, which must necessarily precede any such particular investment for the purpose of the annuity, might be delayed, if the widow chose, during the whole of her life. She was one of the trustees; and, therefore, the power to delay the conversion of the personal estate into money was vested in her jointly with her co-trustee; and, as to the real estate, the power was given to her absolutely. In that state of things, while the property remained unconverted, I apprehend it to be clear that the annuity was an absolute charge upon the whole estate, and of course upon the whole income of that estate.

I agree with what was said by Mr. *Vaughan Hawkins*, that equity considers that done which ought to be done; and, therefore, that this clause, authorizing the postponement of the conversion, would not be allowed to defeat any rights, which ought to have accrued if the conversion had taken place immediately. That is quite true; but, on the other hand, it would be difficult to reconcile with the intention thus appearing any construction of the earlier part of the will, which would represent the annuity as a mere life interest in the whole or part of a separated fund.

So far, there would be no doubt; and I beg your Lordships to observe, with regard to the argument founded upon the context, that if there had been no conversion in the lifetime of the widow, and no particular investment, there would have been no particular fund to go over to the residuary legatees, and the residuary legatees would simply have taken the whole estate, charged in its entirety during the widow's life with this annuity, and they would have taken it all as residuary legatees after her death.

It is said, that the part of the general estate, which is ordered to be thus invested for the purpose of securing the annuity, is made, after the completion of that investment, a specific fund, of which she is thenceforth to be tenant for life, at all events to the extent of £1200 a year, payable out of the income of that fund, and that the *corpus* of the same fund is given over afterwards to the persons who are the residuary legatees. My Lords, that construction appears to me to have been truly described by Lord Justice *James*

H. L. (E.) 1880 CARMICHAEL v. GEE. Lord Selborne, L.C.

as "sticking in the bark." I apprehend it to be clear, that the separation from the residue of this particular sum, as one which would come in after the death of the wife or after her re-marriage, was formal only, and not substantial. It is given *uno flatu* with the residue, to the same persons, and in the same manner. The testator, no doubt, anticipated that it would not come in with the free residue, or at the same time; and therefore he mentioned it as something additional—using a form of expression which distinguished it from that which was residue in the sense of immediate surplus, after making (among other things) proper provision for the payment of the annuity.

But, though thus distinguished as a separated and postponed part of the residue, the whole context shews that those who are ultimately to take it are to take as residuary legatees.

I find, therefore, nothing here, except a testator giving an annuity to his wife; desiring her to enter into the immediate enjoyment of it, contemplating that during the whole of her life it may be a charge upon his general estate; but at the same time providing that, if the estate is converted into money, there shall be a sufficient investment to secure this annuity, so as to release the rest of the estate, and to enable that to be paid over immediately to the residuary legatees.

I will not trouble your Lordships with any observations upon authorities, except to say that this case seems to me to fall within the principles of *May* v. *Bennett* (1) and *Wright* v. *Callender* (2), and to be quite different from *Baker* v. *Baker* (3). With regard to the last case cited by Mr. *Vaughan Hawkins*, *Miller* v. *Huddlestone* (4), that appears to me to have depended upon the special language of a very special will; and, assuming it to have been rightly decided, I find in it nothing applicable to the present case.

I therefore propose to your Lordships to dismiss the present appeal with costs, giving only one set of costs to the Respondents.

LORD HATHERLEY:—

My Lords, I am of the same opinion; and the point is really so short, and has been so clearly presented in the address which

(1) 1 Russ. 370.
(2) 2 De G. M. & G. 652.
(3) 6 H. L. C. 616.
(4) 3 Macn. & G. 514; 21 L. J. (Ch.) 1.

you have heard from my noble and learned friend on the woolsack, that it would be unbecoming in me to occupy any farther time in this discussion. I would simply say it appears to me clear that if you take into your view the two different classes of cases, the one *Baker* v. *Baker* (1), and the other *Wright* v. *Callender* (2), which have been discussed before us this morning, in the one class there is a general trust fund which is partitioned between two parties, the one taking a life interest and the other taking an interest in the remainder. That is the case of *Baker* v. *Baker* (1), and there, of course, the person entitled to the life interest in that fund only, has not any right to do more than receive the income accruing from that fund. But, on the other hand, if you find it to be the gift of an annuity, in which I concur entirely with my noble and learned friend, and, for the same reasons, if I say you find it the gift of an annuity, in this case made to the wife, of £1200 a year, and if you find that that is the character of the gift, those who take subject to that gift, and those who take another portion of the residue of the estate (that gift having been previously directed to be taken out of it), must submit to any loss or inconvenience which may be occasioned by the fact that the estate of the testator has fallen short of what he, and everybody else, had expected would be the condition of the residue. But that will not convert this gift, which was a gift out and out, into a gift which was a life-tenancy only in a portion of the residuary estate, which is the argument that has been presented to us on the present occasion.

Therefore, when one comes to look carefully at the wording of this will, it really seems to me a sufficiently clear one, and that it does not require much exposition or much discussion on the part of your Lordships.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I take it that the whole question turns upon the construction of the will. I do not think there is anything illegal or improper, or that could not in any way be enforced in a bequest by which an annuity was left, which was made payable entirely and exclusively out of the income of

(1) 6 H. L. C. 616. (2) 2 D. G. M. & G. 652.

H. L. (E.) 1880 CARMICHAEL v. GEE.

any particular fund. Of course that might be done, but that, I think, is not done here; and upon that point, and upon the construction of the will, I so thoroughly agree with what has been said by the noble and learned Lord on the woolsack, that I do not think it necessary to add anything farther.

LORD WATSON:—

My Lords, I have no hesitation whatever in agreeing with the views which have been expressed by your Lordships and by the Judges of the Court of Appeal below. I think, according to the true construction of its terms, this will imports a direct bequest of an annuity of £1200 to the testator's widow, followed by a direction, for the purpose of administration, to his trustees, to set apart a sum sufficient to yield an income that would make up that amount, before paying away any part of the residue. I cannot find any words indicative of an intention on the part of the testator to limit the fund out of which it was to be paid, to the income of the sum so set apart, or even, as has been contended in another way by the counsel for the Appellant, out of the income of the estate. I cannot read the terms of what I venture to call the clause disposing of the residue in this case, as a gift to the residuary legatee, not in the nature of a residuary gift, but importing the specific bequest of a sum after that set apart to meet the wife's annuity, accompanied by an expression of his intention that that sum should pass intact to the legatee. I therefore entirely concur with the views already expressed by your Lordships.

Order appealed from affirmed, and appeal dismissed, with costs; one set of costs only being allowed to the Respondents.

Lords' Journals, 1st June, 1880.

Solicitors for Appellant: *Hicks & Son.*

Solicitors for Respondents: *Longcroft & Myers; Stokes, Saunders, & Stokes.*

[HOUSE OF LORDS.]

WILLIAM POSTLETHWAITE . . . . APPELLANT;

AND

JOHN FREELAND AND ALEXANDER FREELAND . . . . . } RESPONDENTS.

H. L. (E.)
1880
May 7, 10, 11; *June* 7.

Charterer—Discharging Cargo, Means for.

The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time.

Per LORD HATHERLEY:—When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.

A charterparty was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of *East London*, in *South Africa*. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the Governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favour of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the Government or of private individuals. The ship arrived at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:—

Held, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage.

THE Plaintiff (the now Appellant) was managing owner of the ship *Cumberland Lassie*. The Defendants were merchants who entered by charterparty into a contract with him by which the ship was to proceed to *Barrow-in-Furness*, and there load a cargo of

H. L. (E.) 1880 POSTLETHWAITE v. FREELAND.

370 tons of steel rails and fastenings, with which it was to proceed to *East London, Cape of Good Hope*, "to discharge at any safe wharf, where ships can always lie safely afloat . . . the cargo to be brought to, and taken from alongside, at merchant's risk and expense." The lying-days for loading were provided for, and demurrage for delay beyond those lying-days was to be £5 per day. On arrival at the port of discharge the stipulation was, "The cargo is to be discharged with all dispatch, according to the custom of the port." The ship arrived off *East London* on the 31st of August, 1875. *East London* is a bar harbour, and a vessel of the burden of the *Cumberland Lassie* could not cross the bar until a considerable part of its cargo was discharged. The ship brought up at the usual place of discharge, about a mile outside the bar, on the 1st of September, 1875, being quite ready to discharge cargo as soon as the means and the custom of the port permitted. When ships arrived at *East London*, and required to discharge cargo, the course was this:—The Colonial Government authorities had formerly exercised complete control over the discharge of cargoes from vessels arriving there. Those vessels lay outside the harbour, and were discharged by means of lighters which, by manual labour, were worked upon a warp and wire. The Colonial Government had, some time since, transferred all its interest and authority in discharging the cargoes of vessels arriving at the port, to a company called the "*East London Landing and Shipping Company.*" All vessels arriving at the port lay outside the harbour till they could use the warp and the lighters employed by the company. Those lighters were worked by manual labour upon a warp, which was itself inside the harbour, but was connected with buoys outside the harbour. The company had only four lighters fit to carry rails, and these and all the other means for discharging cargo were under the absolute control of the *East London Company*. By the regulations of that company each ship arriving at the port was to be discharged in turn, except mail steamers, in favour of which all other vessels were to give way; but as to all other vessels, even if they were Government vessels, no interference on the part of the Government was allowed. When the *Cumberland Lassie* arrived off the port of *East London* there were many other vessels (several with similar

cargoes) already in the port, and entitled by the existing regulations to precedence in the use of the warp and the lighters. The consequence was that the *Cumberland Lassie*, though the master was fully prepared to discharge his cargo, and was anxious to do so, lay idle off the bar from the 31st of August to the 6th of October. On the 6th of October he was allowed to take his turn, and there was no complaint as to delay from that day until the discharge of the cargo. The action was brought to recover the sum of £215 for demurrage in respect of the delay between the 31st of August and the 6th of October. The stipulation in the charterparty, it was contended for the Plaintiff, made the Defendants liable for the delay in discharging the cargo, while for the Defendants it was insisted that, under the circumstances which existed here, the provision for discharging "according to the custom of the port," exempted the Defendants from any liability for a delay which that custom itself had occasioned. The cause was tried before Lord *Coleridge* and a special jury, on the 12th of March, 1878, when his Lordship put the following questions to the jury: 1. Was there any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden, in the port of *East London?* 2. If there was, was the *Cumberland Lassie* unloaded with all dispatch according to that custom? 3. If there was no settled practice, was the *Cumberland Lassie* unloaded with all dispatch under the circumstances? The jury found the first two questions in the affirmative, the third therefore became immaterial. The verdict, on these findings, was ordered to be entered for the Defendants. A rule for a new trial was obtained, and, after argument, discharged. The case was taken to the Court of Appeal, and was heard by Lords Justices *Brett*, *Cotton*, and *Thesiger*, when Lords Justices *Brett* and *Thesiger* were of opinion that the appeal should be dismissed. Lord Justice *Cotton* dissented (1). The appeal was then brought.

Mr. *Butt*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Bigham* was with them), for the Appellant:—

It is the clear duty of the charterer of a vessel to take all

(1) 4 Ex. Div. 155.

H. L. (E.) 1880 POSTLETHWAITE v. FREELAND.

proper means to discharge the cargo, and if he fails to do so he becomes liable for the delay thus occasioned. That principle was laid down in express terms by Lord *Ellenborough* in *Randall* v. *Lynch* (1). In that case forty days were allowed by the charter-party for unloading, but the time taken was thirty-one days beyond that period, and the delay was attributed to the crowded state of the *London Docks* at that time. Lord *Ellenborough* said, "The question is whether the detention of the ship, arising from the inability of the *London Dock Company* to discharge her, is, in point of law, imputable to the freighter; I am of opinion that the person who hires a vessel, detains her, if, at the end of the stipulated time, he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so." His Lordship treated the dock company as the freighter's agents for the delivery of the cargo, and declared that the freighter was "as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather or any other cause." In that case, therefore, the rule was expressed which was in all respects applicable here. The crowded state of the docks, and even the happening of tempestuous weather, were declared not to exempt the freighter from his general liability to procure the speedy discharge of the vessel. In *Ford* v. *Cotesworth* (2) that principle was adopted, and Mr. Justice *Blackburn* said (3): "We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage." That principle had been adopted in *Wright* v. *The New Zealand Shipping Company* (4), so that circumstances not within the control of the freighter were held not to excuse him. The principle was, that the duty to discharge

(1) 2 Camp. 352, 355. See 12 East, 178. See also *Rodgers* v. *Forresters*, 2 Camp. 483, and *Burmester* v. *Hodgson*, 2 Camp. 488.

(2) Law Rep. 4 Q. B. 127; affirmed, 5 Q. B. 545.

(3) Law Rep. 4 Q. B. at p. 133.

(4) 4 Ex. Div. 165, n.

depended on him, and if he did not make special covenants as to any interference with the performance of that duty, he must be held liable. The distinction which was taken in the present case by the Lord Chief Baron (1) that "Lord *Ellenborough* was speaking there of the duties of charterers under a charterparty which limited the time for discharging, not in respect of a charterparty containing such words as occur here, which are, that the vessel is to be discharged 'with all dispatch according to the custom of the port'" could not be sustained. [LORD BLACKBURN:—If he accepted the lighters sent and they were not sufficient, would that render the freighter liable?] It would; it was his duty to provide sufficient means for discharging the cargo, and he must be taken to know the customs and mode of business of the port, and to be prepared accordingly. In *Ashcroft* v. *The Crow Orchard Colliery Company* (2) the Defendants, who had undertaken "to load with the usual dispatch of the port," or to pay 40*s.* a day demurrage, were held liable, though there were regulations at the loading dock prohibiting any persons from having more than three vessels loading at the crane at any one time, and so interfered with the progress of the work. In that case *Tapscott* v. *Balfour* (3) had been relied on as shewing that the lay-days commenced only from the time when the ship was admitted into the dock, which would have had the effect of relieving the charterer, but the Court of Queen's Bench did not adopt that construction of the charterparty, but described the stipulation "as a contract by the charterer that he will load with the usual dispatch, and it is no answer to say that he was unable to do so." In *Adams* v. *The Royal Mail Steam Packet Company* (4) the charterer agreed to load a vessel, on arriving at *Cardiff*, with a cargo of coals, in the customary manner; the loading did not take place as agreed, and in an action for demurrage the delay was held not to be excused by a strike among the colliers and a dispute with a railway company along whose lines the coals were to be brought, for that these matters, though beyond the control of the charterer, had not been contemplated by either party when the charterparty was made,

(1) Printed Appendix, p. 123.
(2) Law Rep. 9 Q. B. 540.
(3) Law Rep. 8 C. P. 46.
(4) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

H. L. (E.) 1880 POSTLETHWAITE v. FREELAND.

and therefore the general rule that the loading must take place within a reasonable time was adhered to. Here, the merchant was bound to have sufficient lighters ready at all events. *Cunningham* v. *Dunn* (1) did not at all affect the general rule of the duty of the charterer, for there both parties knew of the Spanish Government's regulation which would prevent the shipment of the cargo, and an application had been made to the Government to relax it, which application was refused, and therefore it was the common fault of both that the ship was dispatched to make the attempt. [LORD BLACKBURN referred to *Moir* v. *The Royal Exchange Assurance Company* (2).] In *Davies* v. *McVeagh* (3) Lord Justice *Bramwell* states the principle to be deduced from all the cases in these terms: "When a ship is to take on board cargo at a specified place of loading, the responsibility rests, not with her owner, but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time." Of course the same principle applies to unloading as well as to loading a vessel. *Erichsen* v. *Barkworth* (4) was also referred to. In *Thiis* v. *Byers* (5) the principles now contended for were adopted and acted upon. Even where the charterparty allowed a given number of days to the charterer, it was held that in such a case the law implied a contract, on his part, that from the time when the ship was at the usual place of discharge, he would take the risk of any ordinary vicissitudes which might occur to prevent his releasing the ship at the expiration of the lay-days. And *Nelson* v. *Dahl* (6) laid down the rule that when the shipowner had brought the ship as near to the place of discharge as it could safely get, damages for the delay which afterwards occurred in not getting it a berth must fall on the charterer. The principle to be be applied to this case was clear, and there was nothing to exempt the charterer from its operation.

Mr. *Watkin Williams*, Q.C., and Mr. *J. W. McLeod*, for the Respondents:—

It is not necessary to dispute the general propositions contended

(1) 3 C. P. D. 443.
(2) 3 M. & S. 461.
(3) 4 Ex. D. 265.
(4) 3 H. & N. 601, 894.
(5) 1 Q. B. D. 244.
(6) 12 Ch. D. 568.

for on the other side. Where nothing is expressed of course there may be different things implied, but where the contract distinctly entered into between the parties does express precisely what is to be done, no mere implications can affect that contract. It is true that in this case there is a stipulation that the "cargo is to be discharged with all dispatch," but those words are immediately qualified by the added words, "according to the custom of the port." The charterer in terms undertook the duty which the numerous cases referred to were said, by implication, to cast on him, and he qualified the assumption of that duty by words which freed him from its strict observance, if circumstances beyond his control, namely, the custom of the port, rendered him incapable of discharging it. Both parties knew the meaning of these words and agreed to them. And the facts of the case shew that everything which it was in the power of the charterer to do was done, and that in no way whatever did the fault of the delay rest with him. Nor was the delay caused by anything over which he could possibly exercise any control. Under the very words of the contract, therefore, he is free from all responsibility. The charterer was within the principle laid down in *Taylor* v. *Great Northern Railway Company* (1) where the defendant company, which had been prevented, by a stoppage of the line occasioned by the act of another company having running powers over the line, from delivering the plaintiff's goods within a reasonable time, was held to be exempted from responsibility. *Thiis* v. *Byers* (2) was not unfavourable to the Respondents, for the cause of the delay there was the ordinary occurrence of bad weather, the risk of which might well be supposed to be undertaken by the charterer. But here was an obstacle to unloading, arising from a custom of the port quite beyond the power of the charterer to prevent or to remedy, which must be taken to have been known to both parties, and as to which by the very terms of the contract he was agreed to be freed from all responsibility.

Mr. *Cohen*, in reply.

(1) Law Rep. 1 C. P. 385.

(2) 1 Q. B. D. 244.

H. L. (E.) 1880 POSTLE-THWAITE v. FREELAND.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, the question in this case is, whether demurrage is payable for delay in discharging a cargo of steel rails at the port of *East London* in *South Africa*, under the following circumstances:

By the charterparty, the Appellant's ship *Cumberland Lassie* was to take on board at *Barrow-in-Furness*, and to deliver at *East London*, "at any safe wharf where ships can always lie safely afloat, as ordered on arrival, or so near thereto as he" (*i.e.* the master) "can safely get," the cargo in question, which was "to be brought to and taken from alongside at merchant's risk and expense," and "to be discharged with all dispatch according to the custom of the port." For the loading at *Barrow* a fixed number of days was agreed upon, with demurrage at a fixed rate if that time was exceeded.

East London is a port with a bar at its entrance, over which ships heavily laden (as this ship was) cannot pass till they are lightened by the discharge of great part of their cargo. This is done by means of lighters propelled by manual labour along a main rope or warp, running from a quay inside the harbour, across the bar, to a buoy outside, from which they are hauled to the ship's side by means of branch warps. The main warp, and the whole supply of lighters at the port, were in the hands and under the management of the Colonial Government till 1873, when they were transferred by the Government to a company called the *East London Landing and Shipping Company*. It is stated in the Appellant's case that "prior to 1873 the warp had been the property of the Colonial Government, but in that year it was taken over by the company." Mr. *Jameson*, a director of the company, gave evidence to the effect that in 1875, and for some time afterwards, they had a control over the use of the warp; and this is consistent with other parts of the evidence, particularly where it is stated in the Appendix that, when the company had once begun the discharge of a vessel, they "would not allow" any interference, even by the Government surf-boats; and that "when the Government" (which seems to have reserved to itself some sort of concurrent right with the company) "had commenced the discharge of a ship they acted in the same way." The company in 1875 had nine lighters, of which only seven

were in working order, and only four were fit to discharge such a cargo as that of the *Cumberland Lassie*, at the time when that ship arrived. The Government had usually two, and appears to have brought in three more about that time, or soon afterwards, from *Port Elizabeth* in *Algoa Bay*, more than 150 miles off, which was the nearest port where any additional lighters could have been obtained. The rails on board the *Cumberland Lassie* were shipped on account of the Crown agents in the colony; but I do not find in the evidence any proof that, consistently with the usage of the port (as already described), any of the Government lighters were, or could have been made, available for the discharge of this particular cargo, by any arrangements within the charterers' power. When (as happened on the arrival of this ship, and as seems to have usually happened at the same time of the year) there were more ships lying off the bar than the lighters in the port could simultaneously discharge, every ship was discharged in turn, according to the order of its arrival, as reported at the port office; one lighter per diem being sent to it on every working day, till the ship could cross the bar. If no lighter was ready, suitable for the particular cargo, the ship might lose its turn for the day; which, however, did not happen in this particular case.

There were twenty-four working days during which the *Cumberland Lassie* lay idle off the bar at *East London*, from the 31st of August to the 6th of October, 1875, ready (as far as the master was concerned) to discharge the cargo, but prevented from doing so by the priority in the use of the warp, and of the lighters then available at the port, allowed by the custom of the port to ships which had previously arrived there. This ship's turn came on the 6th of October; and no complaint is made of any subsequent delay. The question before your Lordships is, whether demurrage is payable for detention there during those twenty-four working days? At the trial before Lord *Coleridge*, a verdict was given for the Defendants, the charterers, under the direction of that learned Judge. A rule *nisi* was obtained for a new trial; but this, after argument, was discharged by the Lord Chief Baron and Mr. Justice *Hawkins*, sitting as a Divisional Court. Their judgment was affirmed by a majority (Lords Justices *Brett* and *Thesiger*) in the Court of Appeal; Lord Justice *Cotton* dissenting. The appeal

H. L. (E.) 1880

POSTLE-THWAITE v. FREELAND.

Lord Selborne, L.C.

to your Lordships is from that decision, and my opinion is that the judgment appealed from ought to be affirmed.

There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is (as was said by Mr. Justice *Blackburn*, in *Ford* v. *Cotesworth* (1), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration.

These distinctions are well illustrated by three cases in *Campbell's* Reports, which were referred to in the arguments at your Lordships' Bar. In *Randall* v. *Lynch* (2), the charterer was held liable for demurrage, a particular time being fixed by the charterparty for the discharge of the cargo. In *Rodgers* v. *Forresters* (3) (where the contract was to discharge the ship "within the usual and customary time for unloading such a cargo"), and in *Burmester* v. *Hodgson* (4) (where the Court thought this to be the contract which the law ought to imply from the terms of the charterparty), the charterer was held not liable for demurrage. In all those three cases the circumstances which caused the detention of

(1) Law Rep. 4 Q. B. 127; 5 Q. B. 544.

(2) 2 Camp. 352; 12 East, 179.

(3) 2 Camp. 483.

(4) 2 Camp. 488.

the ships were the same, viz., the crowded state of the *London Docks*, in which the ships were, by Act of Parliament, obliged to unload.

If your Lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers* v. *Forresters* (1) and *Burmester* v. *Hodgson* (2), which does not appear to me to be inconsistent with that of the later authorities. Two recent cases were much relied upon in the argument of the Appellant's counsel at your Lordships' Bar: *Ford* v. *Cotesworth* (3) and *Wright* v. *The New Zealand Shipping Company* (4). That of *Ford* v. *Cotesworth* (3) is, I think, perfectly consistent with the earlier cases. The judgment of the Court of Error turned upon a *vis major*, which the Court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by the Lord Chief Justice of *England* (in my opinion correctly, nor do I perceive that the Court of Error thought otherwise) that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port." In the other case (*Wright* v. *The New Zealand Shipping Company, Limited* (4), which is at first sight much more favourable to the Appellant, there were special circumstances on which the decision might very well have been founded, but to which (as it does not appear to me to have been, in fact, founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be supported, or not), are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to have been implied, no custom or other circumstances existed, which would have made it impossible for the charterer, by the use of reasonable diligence, to provide himself with lighters for the discharge of the cargo earlier than he did. What the Lords Justices in that case held was (in Lord Justice *Cotton's* words) that "an

(1) 2 Camp. 483.
(2) Ibid. 488.
(3) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(4) 4 Ex. D. 165, n.

H. L. (E.) 1880 POSTLE-THWAITE v. FREELAND. Lord Selborne, L.C.

obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port;" and it was expressly added that he would not have been bound to provide appliances which were not in use there, but which might be in use at other ports.

In the present case it appears to me to be the true result of the evidence that the *Cumberland Lassie* was discharged "with all dispatch according to the custom of the port." In the construction of this contract, I think that the words "according to the custom," &c. ought to be read in connexion with the word "dispatch." Looking at the natural conditions and the rules of the port, its distance from any other port, the necessity for the use of the warp, and the control over the warp possessed by the *East London Landing and Shipping Company*, I do not think that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying outside the bar of *East London*, when the *Cumberland Lassie* arrived there, can be regarded as an impediment to the due discharge of that ship, collateral to or separable from the custom and practice of the port, against which the charterers ought to have provided, or for which they ought (as between themselves and the shipowner) to be held responsible.

I, therefore, propose to your Lordships to dismiss the present appeal with costs.

LORD HATHERLEY:—

The Appellant was the owner of the ship called the *Cumberland Lassie*, and as such chartered her to the Respondents, the *Freelands*, by a charterparty dated the 28th day of April, 1875.

The ship was to proceed to *Barrow-in-Furness*, and to take on board a cargo of steel rails and fastenings, and to proceed to *East London* (*Cape of Good Hope*) "to discharge at any safe wharf where ships can always lie safely afloat as ordered on arrival, or as near thereunto as she can safely get, and there deliver the same."

The document contained the following provisions:—"The cargo to be brought to, and taken from alongside at merchants' risk and expense." "Twelve running days, Sundays and holidays excepted, are to be allowed the merchants, if the ship is not sooner

dispatched for loading the cargo as above, any days on demurrage over and above the said lying-days at £5 per day."

"The cargo is to be discharged with all dispatch according to the custom of the port."

Now the facts proved in evidence are, that *East London* is a bar harbour, requiring great care and attention in unloading vessels, because they cannot safely carry on the operation until the vessel to be unloaded has been lightened of a great part of its cargo by means of lighters, which are guided across the reef into the harbour, by a process of warping along a hawser taken over the reef to which other ropes are fastened. The supply of lighters appears to be scarcely adequate to the need, when there are many ships to be attended to, and it is in evidence that in the autumn months, when there are sometimes (as was the case in this instance) thirteen ships to be attended to, Mr. *Walker*, a retired harbour-master, says that three months would be required for discharging a ship of the size and laden with a cargo like the *Cumberland Lassie*. This scarcity of lighters seems to arise from a practical monopoly of the lighters and the warping-rope, the business of unloading having been conducted by the Government originally, but afterwards by a company, which bought the concern from the Government.

As a consequence of the supply of lighters not being adequate to the discharge of all vessels as they arrive, there has arisen a custom, or rather usage, of the port by which any vessel arriving is marked for its turn according to the arrival, but with a preference to Government mail steamers.

It appears that the *Cumberland Lassie* was unloaded in the usual way, and that the days occupied, including those in which it had to wait for its turn (being the days in question in this suit), were not more than the number of days usually occupied during the period of the year by vessels of its size and burden.

It appears to me from the evidence and the cases cited at the Bar, that the charterers (the Respondents) have not been in any default in respect to the engagements entered into on their part in the charterparty, viz., "to discharge the ship with all dispatch according to the custom of the port."

The cases shew that when a specific time is named, either in

H. L. (E.) 1880 POSTLE-THWAITE v. FREELAND. Lord Hatherley.

words or by necessary implication, the party who has contracted to unload a ship within the time must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part; for, as was said by Lord *Tenterden* in his work on Shipping (in a passage quoted by Mr. Justice *Blackburn* in delivering the judgment of the Court of Queen's Bench in *Ford* v. *Cotesworth* (1)), "he has engaged that it shall be done." But all that is engaged to be done here "is to proceed with all dispatch according to the custom of the port." Such an engagement might not, perhaps, excuse the merchant from the consequences of any unusual accident arising to delay the discharge of the vessel beyond the customary time of discharge: see *Barker* v. *Hodgson* (2), cited also in *Ford* v. *Cotesworth* (1), because the merchant has contracted that the discharge shall take place within a given time, viz., that of the usual period for discharge of a like vessel in that particular port, and the shipowner is entitled to have his ship back at the expiration of that time or to be paid demurrage, whatever be the cause of delay. But when the contract merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will be, as it appears to me, fulfilling his contract if he employs all the usual methods of dispatch, and especially the warps and lighters usually so employed, and especially also, when, in fact, a dispatch was obtained as great as in the case of any other ship of the same size and burden.

I do not think that the merchant has engaged that he will use any other means of dispatch than those used habitually at the port. It is suggested that he should have taken care that the supply of lighters should be adequate without delay to attend to his ship; but this would be to adopt a course which there is no evidence that anybody frequenting the port ever adopted. So far is that from being the case that no ship is shewn ever to have adopted any other course than that which was used by the Defendants, nor has the argument suggested any usual course as having been omitted by the merchant, which will also be a course coinciding with the usage of the port. Any other course would be outside the contract, and if it failed, as it probably might when

(1) Law Rep. 4 Q. B. 136. (2) 3 M. & S. 269.

adopted for the first time, the consequent result would be a breach of the existing contract to which the demurrage might be attributed. The course taken as to turns seems to me part of the usage. I agree, therefore, with the Lord Chancellor that the appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, the question in this case, in my mind, depends on what, on the true construction of the ordinary clause in a charterparty, "the cargo to be brought to and taken from alongside at merchant's risk and expense," is the extent of the implied undertaking on the part of the merchant to provide lighters or other appliances for taking the cargo from alongside. The parties to the charterparty may, by any stipulations they please, alter the undertaking which would otherwise be implied; but in the charterparty now before this House I think they have not done so. The only other reference to the discharge of cargo is, "the cargo is to be discharged with all dispatch according to the custom of the port." I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charterparty in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be. See *Hudson* v. *Ede* (1), though it was expressly found in that case that the shipowner and his broker were not aware of the usage. In the case of *Wright* v. *New Zealand Company* (2), the Judges of Appeal were of opinion, as *Bramwell*, L.J., expresses it, that the merchants were bound "to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission on the ground that at the port of discharge there was only a certain number of lighters, and when the Plaintiff's vessel arrived, other ships belonging to other persons required those lighters, and the Defendants got lighters for unloading the cargo as soon as they could. To my mind," says he, "those circumstances afford no answer to the

(1) Law Rep. 2 Q. B. 566; affirmed, L. R. 3 Q. B. 412.
(2) Law Rep. 4 Ex. D. 165, n.

H. L. (E.) 1880

POSTLETHWAITE v. FREELAND.

Lord Blackburn.

Plaintiff's complaint; the Defendants having undertaken to unload the vessel were bound to be ready to do it, and to finish it within a reasonable time." And the other members of the Court express the same idea.

I think that if the true construction of the clause, "cargo to be brought to and taken alongside at merchant's risk and expense," is that the merchant undertakes to be ready with lighters to discharge the vessel, the subsequent clause inserted in this charterparty for the shipowner's benefit that "the cargo is to be discharged with all dispatch according to the custom of the port," could not have been intended to relieve him from that undertaking. But the question now to be decided, as I think, is, whether there is an undertaking to that extent.

The facts which are sufficient to raise the question in the present case are few, and are not in dispute. By the charterparty between the Plaintiff, as managing owner of the *Cumberland Lassie*, and the Defendant, the ship was to proceed to *Barrow-in-Furness*, and there load a cargo of steel rails and fastenings, "and being so loaded shall therewith proceed to *East London*, *Cape of Good Hope*, to discharge at any safe wharf where ship can always lie safely afloat, as ordered on arrival, or so near thereunto as she can safely get, and there deliver the same, on being paid freight as follows." * * "The cargo to be brought to and taken from alongside at merchant's risk and expense."

"Twelve running days, Sundays and holidays excepted, are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the cargo as above. Any days on demurrage over and above the said lying-days at five pounds per day. The cargo is to be discharged with all dispatch according to the custom of the port."

The ship sailed with the cargo on board, and arrived off *East London* on the 31st of August, 1875. *East London* is a bar harbour, and a vessel of the burthen of the ship in question could not cross that bar until a considerable part of the cargo was discharged; and it is not disputed that the *Cumberland Lassie* brought up at the usual place of discharge, about a mile outside the bar, and was there on the 1st of September, 1875, and there remained with the captain and crew ready to do their part in

discharging the cargo as soon as any lighter came alongside. No lighter came alongside till the 6th of October. The Plaintiffs the shipowners can in no way be considered the authors of this delay, which, *primâ facie* at least, was an unreasonable time to keep the ship waiting for lighters; and the question seems to me to be whether the merchants are to be considered the authors of this delay, or, in other words, whether they, the Respondents, shewed a sufficient excuse for this delay. The facts proved seem to be not disputed.

It appears that the Colonial Government had laid down a warp, which was anchored inside the bar in the river, and carried across the bar and anchored outside to a buoy; and this warp had been made over to a company called the *East London Shipping and Landing Company*. The lighters in use at the port are decked boats fitted with two horns, and by placing the warp between these horns and along the deck the crew of the lighter are enabled to warp the vessel out across the bar to the buoy outside.

From the buoy the lighter is taken to the ship, being hauled either by lines sent from the ship, or, sometimes, by tugs. The loaded lighter is bought back to the buoy, and then warped back over the bar. Lighters cannot be thus taken across the bar by means of the warp except when the weather permitted it to be used. But between the 1st of September and the 6th of October there were twenty-five days in which the warp could be worked.

The company had only four lighters there fit to carry rails; the government authorities there, who were the consignees of the railway iron, obtained three more; so that there were seven in all; and it is not in dispute that, as far as concerned the use of the warp, more lighters could have been utilized if they had been there. There were waiting for discharge thirteen ships which had arrived before the *Cumberland Lassie*. The seven available lighters were appropriated to the ships in turn as they had arrived, and the *Cumberland Lassie* did not get her turn till so many of those thirteen were discharged as to set a lighter free.

The discharge of the ships previously in port was proceeded with as rapidly as was possible with that limited number of lighters. But if there had been either fewer ships waiting, or more lighters available, this ship would not have been kept so long. There was

H. L. (E.) 1880

POSTLE-THWAITE v. FREELAND.

Lord Blackburn.

evidence that the number of ships was unusually great, owing to the fact that the railway material was then being discharged.

The counsel for the Appellants did not, at your Lordships' bar, think it necessary or desirable to enter farther into the facts, as, if the delay in beginning to unload was not excused, the verdict for the Defendant ought not to stand.

The case came on for trial on the 13th of March, 1878, before Lord *Coleridge* and a special jury. The jurors were told, and I think quite correctly, that "custom" in the charterparty did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port, and it was then left to them to say whether there was such an established custom, and if the *Cumberland Lassie* was unloaded with all dispatch under the circumstances. And in leaving this to the jury he told them in effect that they were to take into account the circumstances as they were, though the number of ships was unusually great, and the number of available lighters fewer than could have been worked by the warp. I should observe that it appears to be clear that no lighters could have been obtained from any other port in a less time than was occupied in discharging the ships that had arrived before the *Cumberland Lassie;* so that no question was raised as to whether, if there had been such, the merchant ought to have obtained them. The only question raised on the facts was that on which Lord *Coleridge* thus directed the jury. It is not disputed that if the direction was right, the verdict for the Defendant was justified. It seems to me clear that if the view of the law afterwards laid down by *Bramwell* and *Cotton*, L.JJ., and, I am inclined to think, as reported, by *Thesiger*, L.J., also, in *Wright* v. *New Zealand Company* (1), is correct, this was a misdirection.

The present cause was brought before the Court of Appeal, then consisting of *Brett*, *Cotton*, and *Thesiger*, L.JJ., shortly after that Court, then consisting of *Bramwell*, *Cotton*, and *Thesiger*, L.JJ., had given judgment in *Wright* v. *New Zealand Company* (1). *Cotton*, L.J., adhered to the view of the law he had taken in that case, and thought there should be a new trial. *Thesiger*, L.J., distinguished the cases, not to my mind successfully, and thought

(1) 4 Ex. Div. 165, n.

the direction in the present case right; and as *Brett*, L.J., agreed with him, judgment was given for the Defendant. The appeal is against that judgment.

As the two decisions—that in the present case and in *Wright* v. *New Zealand Company* (1)—were almost contemporaneous, and were on applications for new trials in cases tried at the same assizes, and almost contemporaneously, I think this must be treated as an appeal from both these cases; so that your Lordships have the opinions of *Bramwell* and *Cotton*, L.JJ., on one side, and *Brett* and *Thesiger*, L.JJ., on the other,—a balance of authority as nearly equal as could well be. It is very singular, considering how long charterparties having a clause in this form have been in use, that there should be no direct authority on the subject; but so it is. At least the counsel at your Lordships' bar were able to cite none, and I have not been able myself to discover any. It is almost as singular that the question should at last have been raised in two cases almost at the same time, and that the Court of Appeal should be equally divided in opinion. I think your Lordships must decide on analogy to other cases, and on general principles of law; and though I have felt, and still feel, that there is a great deal to be said in favour of the view of the law taken by those Judges who are in favour of the Appellants, I have come to the conclusion that the ruling of Lord *Coleridge* and the judgment below were right, and that this appeal should be dismissed with costs.

As the merchant, if not himself resident at the port of discharge, at all events has a consignee and correspondent there resident, he presumably knows all about the means and appliances for discharging a ship there better than the shipowner. It, therefore, seems very reasonable that the shipowner in making his bargain should require the merchant to make an estimate of the probable time of discharging the ship, and take on himself the risk of that time being exceeded; and then the shipowner can fix the payment he is willing to take with reference to this; and this has long been done by providing lay days and demurrage days for the discharge.

In the last edition of *Abbott* on Shipping published while Lord

(1) 4 Ex. Div. 165, n.

H. L. (E.) 1880 POSTLE-THWAITE v. FREELAND. Lord Blackburn.

Tenterden was living, it is said (1), "The usual clauses purporting that it is covenanted and agreed by and between the parties that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful to detain the vessel for those purposes a farther specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her, he is liable to an action on the contract, in the form adapted to the nature of the instrument. If a ship be so detained, the daily rate of demurrage mentioned in the charterparty will in general be the measure of the damages to be paid; but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner; and the amount must be settled by a jury if the parties cannot agree. And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" These last words are put in italics by Lord *Tenterden.* It still remains the more usual form of charterparty to insert lay-days and demurrage days. In many of the cases cited on the argument at the Bar the charterparties were of this nature, and the question only was whether the lay-days had begun to run. *Tapscott* v. *Balfour* (2) was of this nature; for though the charterparty did not name a specific number of days, it provided that the ship was "to be loaded by the Defendants at the rate of 100 tons per working day;" and as the burden of the ship was known, and *id certum est quod certum reddi potest,* this was equivalent to naming a certain number of days. No question could have been made, if there had been lay-days in the present charterparty, that they would have begun to run on the 1st of September.

Neither does *Thiis* v. *Byers* (3) bear on the present case. The Judges there say, "We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that

(1) 5th Ed. p. 180. (2) Law Rep. 8 C. P. 46.
(3) 1 Q. B. D. 244.

from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days." Had there been lay-days in this case, that would have had a bearing on the question whether the days on which the weather prevented lighters from crossing the bar were to be reckoned as lay-days or not. The parties can by express agreement prevent any dispute as to this, as was done in *Hudson* v. *Ede* (1), though, as that case shews, they may, unless they are cautious, produce results which they did not anticipate.

But, for whatever reason, the parties who framed the charter-party in this case, and that in the case of *Wright* v. *New Zealand Company* (2), did not choose to have lay days for the discharge of the vessel, and consequently it is left to the Court to say what is the contract implied by law, not qualified in any way in the charterparty in *Wright* v. *New Zealand Company* (2), and in the present case only qualified, if at all, by the provision that the cargo is to be discharged with all dispatch according to the custom of the port. The strongest argument in favour of the Appellants is, I think, this:—"Is not the freighter," says Lord *Ellenborough* in *Barker* v. *Hodgson* (3), "the adventurer who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue." And on this principle it was held in that case, and has been held in several others, that there is an absolute contract on his part to furnish a cargo, and that he is bound to pay damages if it becomes impracticable to do so; though it would be otherwise if it became illegal to do so. The cases of *Adams* v. *Royal Mail Steam Company* (4), and *Kearon* v. *Pearson* (5), proceed on this principle. The parties may and often do provide by express qualification that strikes, quarantine, or other impediments shall excuse the merchant. And perhaps the same effect may be produced if it appear that the contract was framed with reference to any particular state of things: *Harris* v. *Dreesman* (6). I am not aware of any case

(1) Law Rep. 2 Q. B. 566.
(2) 4 Ex. D. 165, n.
(3) 3 M. & S. 267, at p. 270.
(4) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.
(5) 7 H. & N. 386.
(6) 23 L. J. (Ex.) 210.

H. L. (E.) 1880 POSTLETHWAITE v. FREELAND. Lord Blackburn.

contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. And this seems to be the basis of the judgments of *Bramwell* and *Cotton*, L.JJ., and, as it rather seems to me of *Thesiger*, L.J., also, as then expressed, though he does not adhere now to that opinion, in *Wright* v. *New Zealand Company* (1), and of *Cotton*, L.J., in the case now at Bar. But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo. There is no case in which it has been held so to do; and, as far as I can find, there is nothing in any of the text-books in support of the doctrine that it does; and, as it seems to me, what authority there is (I agree it is not very direct), is against the position.

In *Rodgers* v. *Forresters* (2) the charterparty expressly stated that "the said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge." The facts appearing to be that the cargo, wines, was of such a nature that it was usual and customary to unload in a bonded warehouse, and that the delay in this particular case was owing to an unusual crowd of shipping in the docks, Lord *Ellenborough's* ruling was that the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks. In *Burmester* v. *Hodgson* (3), which came on before Chief Justice *Mansfield* three days afterwards, the point was still more clearly raised. There was no charterparty there, the question arising on a bill of lading, but as the Defendants were consignees of the whole cargo of brandies, that did not, I think, make any difference. The bill of lading was silent as to the period of discharge. It appeared that the ship entered the docks, and did not complete its discharge for sixty-three days.

(1) 4 Ex. D. 165, n. (2) 2 Camp. 483. (3) 2 Camp. 488.

It appeared, says the report, to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are not overcrowded, twenty or twenty-three days are a sufficient space of time for unloading.

In *Burmester* v. *Hodgson* (1) *Mansfield*, C.J., said, "Here the law could only raise an implied promise to do what was in *Rodgers* v. *Forresters* stipulated for by an express covenant; viz., to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in turn, into the bonded warehouses. Such time has not been exceeded by the Defendant. If the brandies were to be bonded they could not be unloaded sooner, and the Defendant seems to have been as anxious to receive, as the Plaintiff was to deliver them."

This was an express decision that the merchant was not responsible for the forty days' delay occasioned by the unusually crowded state of the docks. I cannot see on what principle the merchant can be responsible for the lighters being too few to unload the unusual number of ships, if he is not to be responsible for the dock being too small to unload the same unusual number.

In *Ford* v. *Cotesworth* (2), in error, it was held that the contract implied by law was not, as *Mansfield*, C.J., had held, a contract to discharge in the usual and customary time, but one that the merchant and shipowner should, each, use reasonable dispatch in performing his part. But this does not in the least affect the point for which the ruling in *Burmester* v. *Hodgson* (3) is in this case valuable,—that in considering what is reasonable dispatch under the circumstances, the number of ships there, though unusually large, is one of the circumstances to be taken into account. In *Taylor* v. *Great Northern Ry. Co.* (4) it was laid down that a "reasonable time" meant what was reasonable under the circumstances. *Byles*, J., there says, "My brother *Hayes* treats ordinary time and reasonable time as meaning the same thing; but I think reasonable time means a reasonable time, looking at all the circumstances of the case. The delay in this case was an accident, as far as the Defendants were concerned, entirely beyond their control, and therefore I think they are not liable."

(1) 2 Camp. 488, at p. 489.
(2) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(3) 2 Camp. 488.
(4) Law Rep. 1 C. P. 385.

H. L. (E.)
1880
POSTLE-THWAITE v. FREELAND.
Lord Blackburn.

This is, I think, right, and applicable to the present case.

The only other case which it is necessary to notice is *Ashcroft* v. *Crow Orchard Colliery Company* (1). There the regulations of the docks, which were known to both parties, were, amongst others, "No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels at the docks loading and to load at the cranes at one time."

By the charterparty the vessel was to load in the docks: "to be loaded with the usual dispatch of the port."

The facts were that the Defendants acted as their own coal agents, and had at the time thirteen ships which had priority of the Plaintiffs; and the ship was in consequence kept outside the dock for thirty days after it was at the disposal of the Defendants, but before the dock company would admit it. The decision of the Court was that the contract was to load with the usual dispatch, and that this self-imposed inability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it; which in fact they did not. I think this, which is probably right, has no bearing on the present case.

The result is, that I come to the conclusion that the ruling of Lord *Coleridge* was right, and that the appeal should be dismissed with costs. This is hard on the shipowner, who is in no default, and who probably never would have entered into a charterparty in those terms if he had thought he thereby incurred such a risk of delay. All that a Court of Law can do is to construe the contract as the parties have made it; so as to make it as clear as can be, what the legal effect of such a contract is. The parties can, by altering the terms of their contracts in future, avoid any inconvenience that arises from that construction. It is, no doubt, not an easy thing to introduce a new form of contract into mercantile use, but it can be done.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th June, 1880.

Solicitors for Appellant: *Parkers.*
Solicitors for Respondents: *Allin & Greenop.*

(1) Law Rep. 9 Q. B. 540.

Approved. THRASY-VOULOS IOANNON v. PAPA CHRISTOFOROS DEMETRIOU [1952] A.C. 84

[HOUSE OF LORDS.]

MARIA MANGINI STURLA AND OTHERS . APPELLANTS;

AND

FILIPPO TOMASSO MATTIA FRECCIA, AUGUSTUS KEPPEL STEVENSON AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1880 June 15, 17, 18.

Evidence—Public Document—Statements in.

The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the Government, is not necessarily admissible in the Courts here, as evidence of all the facts stated therein.

M., the consul in *London* for the then Genoese Government, applied in 1789 to his Government to receive the rank and employment of diplomatic agent here. The Executive Government (*Collegii*) referred the application to a committee called the *Giunta della Marina* to inquire into the propriety of the proposed change of appointment, and into *M.*'s fitness for the post of diplomatic agent. The *Giunta* reported favourably on both points. In the course of the report the *Giunta* described him as "a native of *Quarto* of about forty-five years of age." He was appointed in 1790, and died in *England* in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the *Freccia* family, who claimed to be next of kin, and whose claim was founded on an allegation that *M.* had been born at *St. Hario* near *Genoa* in 1735. Other persons then claimed to be next of kin, asserting that *M.* had been born at *Quarto* in 1744. In a suit between these two sets of claimants the report of the *Giunta* was tendered in evidence as fixing the real place and time of *M.*'s birth:—

Held, that it was not admissible for that purpose.

Per LORD BLACKBURN:—"A public document" means a document that is made for the purpose of the public making use of it—especially where there is a judicial or *quasi*-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous decision of Vice-Chancellor *Malins* (1). The facts of the case are fully set out in the report in the Court below.

(1) The case is reported in the Courts below under the names of *Polini* v. *Gray* and *Sturla* v. *Freccia*, 12 Ch. D. 411.

H. L. (E.) 1880 STURLA v FRECCIA.

The following summary of them is all that is necessary for the present report.

A Mrs. *Mangini Brown* died in *London* intestate on the 21st of December, 1871, leaving personal estate to the amount of £200,000. She was a widow above ninety-three years of age. It was not known whether she had any relatives, and her estate was therefore taken possession of by the then Solicitor to the Treasury, Mr. *Gray*, on behalf of the Crown. A suit was subsequently instituted by persons of the *Freccia* family, who claimed to be Mrs. *Brown's* next of kin. Mrs. *Brown* was the daughter of *Antonio Mangini*, who in the early part of his life had been consul in *London* for the Ligurian Republic, and in March, 1876, the Chief Clerk (to whose examination the title of the claimants had been referred) made his certificate declaring that *Antonio Mangini* was a native of the village of *St. Ilario* near *Genoa*, and was, in 1735, baptized there as *Antonio Mangini*, the son of *Giovanni Battista Mangini*, and that the members of the *Freccia* family were the next of kin. The Court, on farther consideration, made an order in favour of that family. Before that order was acted on fresh claimants appeared, now represented by Madame *Sturla* and the other Appellants, and the case they set up was that the consul was one *Antonio Maria Mangini*, and was born at *Quarto*, near *Genoa*, in 1744. On reference of this new claim to the Chief Clerk for examination, he reported adversely to it, and the Court then made a fresh order on the original certificate, and some of the fund was paid out under this order.

An action (*Sturla* v. *Freccia*) was then brought to determine these adverse claims, and the chief point in dispute related to the identity of *Antonio Mangini* and the place of his birth, whether *St. Ilario* or *Quarto*. On the evidence proposed to be given in that action, the present question arose.

It appeared that on the 26th of June, 1789, Consul *Mangini* applied to his Government to be appointed the diplomatic agent of the Republic. The letter of the Consul, making the application, was referred by the *Collegii* to the *Giunta della Marina*. This *Giunta* was a body of officials consisting of three members, one selected from the senate and two others from the *Camera* or finance division of the Government. The report of the *Giunta*,

dated in March, 1790, began by referring to the details of the business required to be performed in *London*, and stated how much more advantageous it would be for the Government, if that business was intrusted to a diplomatic agent than merely to a consul, who held no diplomatic position. It then referred to some occasions on which *Antonio Mangini* had well exerted himself in the business of the Government, spoke of his disinterestedness in not having his postage expenses repaid him, and mentioned that it had again been commanded to obtain more precise information respecting *Mangini*, and proceeded thus: "*Consul Mangini is a native of Quarto, aged about forty-five*, of civil extraction, and while still young, wishing to try his fortune abroad," went to *Lisbon*, engaged in commerce there, then went to *London* and engaged in commerce there; and the report went on to give details of his life here, saying that "Every Genoese who arrives in *London* and inquires about him is treated by him with courtesy" ("*lo tratta con proprietà*"), and it gave details of his becoming rich, living in good style, and speaking several languages, and concluded by recommending him for the appointment of diplomatic agent. He was appointed by a letter patent signed by *Borelli*, Secretary of State, and dated the 16th of April, 1790; and he lived here till his death, which happened in 1803. This report of the *Giunta* was offered as evidence to prove that the Consul had been born at *Quarto*. Its reception was objected to, and Vice-Chancellor *Malins* declined to receive it as "evidence as to the place of the birth or the age of the Consul." The decision of the Vice-Chancellor was affirmed by the Lords Justices, and hence this appeal.

Mr. *J. Pearson*, Q.C., and Mr. *Wills*, Q.C. (Mr. *Edward Beaumont* was with them), for the Appellants):—

The Court below wrongly rejected a document which on every legal ground was admissible in evidence. There could be no reasonable ground for doubting that it was a perfectly genuine document. Assuming that to be so, then it was admissible by the laws of this country as a report made by public officers to their superiors, upon a matter which concerned the public service of the country, and which had been referred to them for inquiry. The

H. L. (E.) 1880 STURLA v. FRECCIA.

report was therefore essentially a public document, and required that credit should be given to its statements. [LORD BLACKBURN:—The *Giunta* satisfied itself that *Mangini* was a respectable person fit to be put into the employment he asked for, that was the matter specially referred to the *Giunta*,—do you say that that makes all the rest of the document admissible in evidence?] Certainly. The document is a public document and the whole of it is admissible. The Government acted upon it. The report was part of the transaction of the appointment to the office, and so admissible: *Collins* v. *Maule* (1). The certificate of the Secretary at War has been received to prove that a man was a serjeant in the army and so free under the Mutiny Acts from arrest: *Lloyd* v. *Wooddall* (2). In *Stead* v. *Heaton* (3) entries by parish officers of proportions of church rates received by them were not only admitted as evidence of the fact of receipt, but as evidence to explain and settle the proportions. In *Price* v. *Littlewood* (4) Lord *Ellenborough* admitted old entries in a vestry book signed by the churchwardens, as evidence to establish a claim of title to a pew in the church of *Hendon*, observing that the entry was made by the churchwardens on a matter within the scope of their official authority. And even a verbal statement as to the amount of rent, made by the man who paid it, to his son, was, after that man's death, admitted in a case relating to the settlement of a pauper. *The Queen* v. *Birmingham* (5). Entries made in the usual course of business are admissible: *Doe* v. *Turford* (6); *Pritt* v. *Fairclough* (7): [LORD BLACKBURN:—Must they not be made at the time and in the discharge of the particular duty: *Smith* v. *Blakey* (8).] And the post-mark on a letter posted in *Essex*, marked there, and forwarded to *London* on its way to *Scotland*, and produced with the proper post-marks on it, was received as evidence of a publication in *Essex*, and that it had reached its destination in *Scotland*: *Warren* v. *Warren* (9). And corporation books are admissible as public documents (10), the

(1) 8 C. & P. 504.
(2) 1 W. Bl. 29.
(3) 4 T. R. 669.
(4) 3 Camp. 288.
(5) 1 B. & S. 763.
(6) 3 B. & Ad. 890.
(7) 3 Camp. 305.
(8) Law Rep. 2 Q. B. 326.
(9) 4 Tyrw. 850; 1 C. M. & R. 150.
(10) *Taylor* on Evidence, 7th Ed. s. 1781, p. 1484; Hub. on Suc. 537; *Rex* v. *Mothersell*, 1 Str. 93.

principle being, that entries made by persons discharging a public duty, and in discharge of that duty, were afterwards admissible to prove the facts therein stated. As to documents kept in public offices in this country they had constantly been received in proof of the facts stated in them. A bankrupt register is so: *Arnold* v. *The Bishop of Bath and Wells* (1). In *The Irish Society* v. *Bishop of Derry* (2) entries in the books kept at the First Fruits Office were admitted to prove a collation to a living made by the bishop at a particular time, and so also were returns made by him in obedience to writs from the Exchequer requiring him to state the vacancies of, and presentations to, the livings in his diocese. They were statements made by a public officer in the discharge of a public duty. Inquisitions *post mortem* are always admissible, for the reason that they are made under commissions from the Crown. In *Burridge* v. *The Earl of Sussex* (3) a deed of entail of an estate was recited in an *inquisitio post mortem*, which was not only admitted to prove that there had been such a deed, but, the particulars of the deed being recited therein, it was received as proving those particulars. Such inquisitions were always received in evidence in peerage cases in proof of pedigree. [Many peerage cases were referred to in proof of this statement, among these were *The Lumley* (4); *De Roos* (5); and *The Slane* (6) claims of peerage.] In the case of the *Earldom of Devon* (7) an *inquisitio post mortem* was admitted in proof not only of a title to lands and advowsons, but also to shew by whom and in what manner they had been dealt with.

In like manner the Herald's visitations are admissible to prove pedigree: *Stainer* v. *Droitwich* (8); *Pitton* v. *Walter* (9); *Matthews* v. *Port* (10). These were cases at Law. And in *Vernon* v. *Manners* (11) the heralds' books were admitted to prove "cosinage" [relationship] on a question of challenging the array. So that

(1) 5 Bing. 316. See *Bishop of Meath* v. *The Marquis of Winchester*, 4 Cl. & F. 445.
(2) 12 Cl. & F. 641.
(3) 2 Ld. Raym. 1292.
(4) 1723, 22 Lords' Jour. 299.
(5) 1804, Min. of Ev. 339.
(6) Min. of Ev. 1830–1835, 13; 5 Cl. & F. 38–39.
(7) Sir Harris Nicolas' Report, Append. xxiv.
(8) 1 Salk. 281.
(9) 1 Str. 162.
(10) Comb. 63.
(11) Plowd. 425.

H. L. (E.) 1880 STURLA v. FRECCIA.

the observation of Lord Justice *Brett* in the present case (1), that their admissibility is peculiar to committees for privileges, is entirely inapplicable. And in the *Shrewsbury Case* (2) it was shewn how careful were committees for privileges in these matters, for there one visitation was refused to be received because the commission under which it was taken was not produced, and another was admitted because the proof of the commission and the deputation to the heralds, had been supplied (3). And in the *Attorney-General* v. *Kohler* (4) it was expressly declared that the rules of evidence in pedigree cases had not been relaxed of late years. In all these cases the findings were those of official persons having authority to perform a duty and acting in obedience to the authority conferred on them.

Even decisions in the Courts of Chivalry were recognised, though it might perhaps be said that they were not regularly established Courts, but were, in fact, only special commissions. [LORD BLACKBURN :—It is said in *Comyns'* Digest (5) that "the Court of Chivalry has an absolute jurisdiction by prescription in matters of honor, pedigree, descend, and coat armour," and a case in Modern Reports is quoted as the authority (6).]

Funeral certificates produced from the *Heralds' College*, taken by the Officers of Arms under orders from the Earl Marshal, are admissible in evidence to prove the facts stated in them : *The Vaux Peerage* (7). The reason being that the certificates were made by official persons in the discharge of the duties of their office. Such persons have a duty to perform and have no interest to misrepresent. [LORD BLACKBURN :—That goes to the weight of the evidence, not to its admissibility.] But where an entry was recorded by an appointed official not in the discharge of his duty, that entry, though produced from the proper custody, would not be admissible in evidence, for it must be made in discharge of a duty, that distinction being taken more than once in the *Shrewsbury Peerage Case* (8). But these conditions being complied with it is admissible to prove the facts stated in it.

(1) 12 Ch. D. at p. 433.
(2) 7 H. L. C. 1, at p. 34.
(3) Ibid. at pp. 27, 34.
(4) 9 H. L. C. 654.
(5) Tit. Courts, E. 2.
(6) *Russel's Case*, 4 Mod. 128.
(7) 5 Cl. & F. 526-541.
(8) 7 H. L. C. 1.

The recitals in private Acts of Parliament as to property were once admissible: *The Wharton Peerage* (1); though they are not so now, because those Acts are no longer submitted to the previous adjudication of the Judges: *The Shrewsbury Peerage Case* (2); while they were so they had a very high authority (3).

It is submitted, therefore, that this document being a report made by a public body on a matter into which that body was directed to inquire—made to the Government of the Republic and acted on by that Government, is a public document of state, to which credit is to be attributed, and is admissible in evidence to prove the facts stated in it. All the reasons which render public documents in this country admissible in the Courts here, apply in full force to this document, which ought therefore to have been received, and was improperly rejected.

Mr. *Napier Higgins*, Q.C., Mr. *Bagshawe*, Q.C., Mr. *Everitt*, and Mr. *Benjamin Eyre*, appeared for the Respondents, but were not called on to address the House.

Mr. *Rigby* was for the trustees of the fund.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the question on this appeal is one as to the reception of evidence. The document in question, a report of certain persons called the *Giunta di Marina*, at *Genoa*, is sought to be put in evidence for the purpose of proving that a person who was formerly consul for the Genoese Republic in *London*, and the succession to whose daughter, Mrs. *Brown*, is now in question, was a native of *Quarto* near *Genoa*, and at the time that report was made, aged about forty-five years. The document has been tendered for that purpose and for that purpose only.

My Lords, upon that question of evidence it is that we have heard an argument at very great length, the case having been very ably presented on the part of the Appellants. I believe none of your Lordships thinks it necessary to hear the Respondents on that point. The evidence has been rejected by the Courts below,

(1) 12 Cl. & F. 295. (2) 7 H. L. C. 1.
(3) *Per* Lord *Lyndhurst*, L.C., *Wharton Peerage Case*, 12 Cl. & F. 302.

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Selborne, L.C.

and I think all your Lordships are of opinion that its rejection was unavoidably necessary, by reason of the rules applicable to questions of this kind, in the law of *England*.

There is abundant proof that the report, which contains the passage it is desired to use, is an authentic public document of the Genoese Government, to which, so far as the good faith of those who made it is concerned, credit might be justly given on any occasion on which it might properly be used. But your Lordships, in this case, have to consider what is the nature of that report, and how far the statements contained in it can be brought within the rules of the English law of evidence as to the proof of pedigree.

The nature of the report is this: Mr. *Mangini* had been consul in *London* for about ten years, and desired to be advanced to a somewhat higher authority as agent of the Republic. He had made application in writing for that appointment. He was at that time, and he remained afterwards, in *London*. There is no evidence before your Lordships as to any relatives of his at *Genoa* having had anything to do with the statements contained in this report, nor is there any evidence to connect any of those statements with representations proceeding directly from Mr. *Mangini* himself. The public authority at *Genoa*, with whom rested appointments of this description, was called the *Collegii*, being in point of fact, a joint assembly of certain members of the Executive Government of *Genoa* and the Senate. With them appointments of this description appear to have rested. It seems to have been a common practice of theirs (whether universal, I will not assume one way or the other,) to refer applications of this kind to a species of executive sub-committee, which was called the *Giunta di Marina*, or Navy Board. Why it was so called does not very clearly appear. That committee was composed, if I am not mistaken, of two members of the senate and one of the finance board. The nature of the reference appears upon the face of it. It was to learn what could be known about the fitness of the person who had made application for the appointment in question, and to report the result to the *Collegii*, with whom the appointment rested. In fact it was an executive sub-committee to assist a department of the Government, by collecting and reporting information, either as to applicants for public appointments generally, or as to applicants for appointments of this particular kind.

It does not appear that any particular rules were prescribed to them as to the kind of information which they should collect; still less as to the evidence which they were to require to substantiate such information. What the law of *Genoa* as to legal evidence may be, we do not know; and certainly there is nothing here from which we can be entitled to assume that it is the same as the law of *England* upon matters of this kind. Whatever it is, there is nothing to lead to the conclusion that, in the discharge of this particular duty, the persons composing the subcommittee of the Executive Government of *Genoa* were bound to confine themselves to any particular description of evidence, whether of that kind which the law of *Genoa* would be satisfied with in judicial proceedings, or of the kind which the law of *England* requires in such proceedings; and to assume, in point of fact, that they were obliged to limit themselves to that sort of information which we should regard as evidence, in matters of this description, in the Courts of this country, would be, to say the least, a violent and unreasonable supposition.

The report which they made contains the history of what they had collected, in some way or other, as to the life of this gentleman. I have no doubt whatever that they received information, which they thought was correct, upon all the points comprehended in that report; but whence that information was received does not at all appear; certainly it does not appear that it, or any part of it, was received from any member of Mr. *Mangini's* family. We may conjecture, not unreasonably, that if this committee in *Genoa* was acquainted with members of the *Mangini* family resident in or near that city, it may have had recourse to them; but there is nothing to shew that in point of fact this was done, or that there were no other means by which the *Giunta* might have obtained such information as is contained in the report. If your Lordships look through that information, you find it concludes by stating that every Genoese who, during the time Mr. *Mangini* had been consul in *London*, had occasion to ask for his good offices, had been received by him with courtesy and hospitality, and was very well satisfied with the manner in which Mr. *Mangini* discharged his duties as consul. The *Giunta*, therefore, had probably been in communication with some persons who had

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Selborne, L.C.

become acquainted with Mr. *Mangini*, in the discharge of his duties as consul in *London*, and there is nothing to shew that all the information received may not have been obtained from some such persons; and, if from them, there is nothing to shew whether those persons obtained the information from *Mangini* himself, or from others who were acquainted with him and talked about him. There is nothing to shew that at that time there were not people living at *Genoa* who, though not his relations, were more or less acquainted with Mr. *Mangini*, who might have heard these things from others, and from whom this information might have been obtained. That those persons obtained their information from the members of *Mangini's* family, or from *Mangini* himself, is of course quite possible;—it may be so, but that is a mere conjecture, which has no element of reasonable certainty about it. If, therefore, it is necessary that the information received by the *Giunta* which is contained in this report should be founded on statements proceeding from *Mangini* himself, or from some member of the family to which *Mangini* belonged, to make it admissible in evidence for the purpose for which it is tendered, there is not anything either in the nature of the case, or in the tenour of the report itself, or in any other evidence which has been brought to your Lordships' knowledge, to lead to that conclusion; and, my Lords, I am of opinion that it is necessary, by the law of this country, in order to make this report receivable in evidence, that it should at least appear to have been founded upon statements made by members of *Mangini's* family or by *Mangini* himself.

My Lords, several classes of cases in which evidence, not depending upon the oath of persons who have personal knowledge, is received in matters of pedigree, by the law of this country, have been referred to at your Lordships' Bar. It appears to me that none of those classes of cases has really any tendency to support the Appellants' proposition. Two of them may be laid aside at once—those which consist of declarations made against the interest of the persons making them—and those which relate to entries made in the course of business by persons whose duty it was to make those entries. They may both be laid aside; because, besides other conditions to which I need not particularly advert,

they both involve this, as a necessary element, that the subject-matter of the declaration in the one case, and of the entry in the other, must have been within the direct personal knowledge of the person making the declaration, or making the entry. That can have no application here.

Then, my Lords, other classes of cases were referred to, namely the findings of competent public officers, courts, or persons having legal jurisdiction to inquire, under public authority, into matters within that jurisdiction; as in the cases of inquisitions and visitations of heralds under commissions from the Crown. I do not my Lords, think that cases of that kind have any bearing at all on this matter. It does not appear that this *Giunta di Marina* had any legal jurisdiction whatever. Its members were not in the nature of a Court, not in the nature of persons who, like the heralds, had authority by law, for a public purpose, to make particular inquiries, whose duty it was, in the exercise of that authority, to proceed upon just proof, and who may be presumably supposed to have discharged that duty properly, and to have taken such proof, and only such proof, as the law of the country required concerning the several matters before them.

Another species of evidence was referred to, analogous to that, but distinguishable from it; namely, Funeral Certificates entered in the heralds' books. They stand upon this ground. It was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books. Therefore, from the fact of their being so recorded it is reasonably to be presumed, that the duty was duly discharged; it is evidence, that they did receive from persons, who were competent witnesses, such declarations. To go now into particular cases, and to consider whether or not the evidence of books or documents of that nature should have been received in any particular instances which may be more or less open to criticism, appears to me to be unnecessary. This case is quite different. This *Giunta* was not a body which had any such legal jurisdiction; it was not a body which is shewn to have been, or which can be presumed to have been, bound to proceed on any such kind of proof. It appears to me have been perfectly open to its members to receive any species

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Selborne, L.C.

of information, on hearsay or otherwise, to which they themselves at the moment thought credit could be given; and, therefore, I am unable to apply to them any analogy derived from the cases of Courts, Commissioners, or other persons having a special duty or authority under the English law to make particular kinds of inquiries, to whose inquests or recorded proceedings credit is *primâ facie* given.

My Lords, I do not think it is necessary to dwell farther upon the case. Some ground must be shewn for the reception of a document of this kind as evidence. It appears to me, my Lords, that no ground has actually been shewn, and under the circumstances I think your Lordships must decline to receive it. Of course that does not necessarily dispose of the case; although, from what we have heard at your Lordships' Bar, it is not improbable that in effect it may do so.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion as that which has been expressed by my noble and learned friend.

I have anxiously listened to see whether or not there was any case made by the Appellants which could at all be brought within the range of the now very numerous authorities which have settled and determined, with tolerable precision, the rule to be adopted with reference to evidence which may come within the class of hearsay evidence, for it really amounts to no more than that. The exceptions which have been made I need not go through or attempt to classify.

When you come to look at the character of the document which is sought to be produced what do you find? There are no original entries to be found in that document, but there appear to have been books kept, although we have not any very precise information about how they were kept or whose duty it was to keep them, and the like; but they were kept on behalf of a body called the *Giunta di Marina*, which body was selected by the Senate to make certain inquiries as to such particular things as they thought it necessary to inquire into; and on those they reported. In this instance they reported upon a reference made to them to learn something about the antecedents, the character,

and the then present *status* of Mr. *Mangini*, who was serving in a certain capacity, in fact as consul, in this country, for the republic of *Genoa*. He was anxious to advance himself in his vocation by acquiring a higher authority. He was anxious, therefore, to obtain from the Senate the distinction of being called agent of the republic instead of bearing the simple name of consul, a point which he thought would lead to some advantage in his position on the one hand as regarded himself, and on the other hand as regarded his influence at the Court to which he was accredited. The Senate referred this matter to the *Giunta*, and desired that body to get more information (for that is what it really amounts to) about his position and character. The consequence would be that they would have to report, which they subsequently did.

The question now is how far the report which they so made can be put in evidence in proof of facts which are narrated in it, not as specific findings, important and essential to the duty they had to perform, but simply as part of the narrative upon which their recommendation is finally made.

The class of cases that come most near to this, are those in which persons made entries consistently with a duty imposed upon them, and made those entries (as it was held in *Doe* v. *Turford* (1), they must do to make them evidence) at the time of the duty being performed. In the particular case in which the document is brought forward on the present occasion, these two things are sought to be proved by the introduction of the document by way of evidence, viz., that there is mention of *Mangini* having been born at *Quarto*, which is a place near *Genoa*, and of his age at that time.

It is important in the case pending between these parties at this moment, with reference to this large sum of money, £200,000, left by Mrs. *Brown*, to prove that he was born at *Quarto*. But when you compare the great importance of that statement with the place it occupies in the report, certainly it is impossible to be much impressed in favour of an inquiry, such as is usual in pedigree matters, having been had recourse to by the tribunal, or committee, as I would rather call it, which had been formed, for it is simply mentioned incidentally, as a part of the description of this

(1) 3 B. & Ad. 890.

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Hatherley.

gentleman, that he was born at this place called *Quarto*—a matter which is not of the slightest importance with regard to anything they were investigating or directing their particular attention to at that time.

It is also said, and with more plausibility undoubtedly, that the question of his age, which is also sought to be proved by putting in this document, was one of more immediate reference to the duty the *Giunta* was then engaged upon. If you were to refer to anybody, to give an account of all they knew of somebody who offered himself for your service, whether it be public or private service, the probability is, that among other things, the age of the person concerned would be one of the points which you would wish to have information upon. The place where he was born you would probably care little about, at least in a case situated as this is, and with an employment of the character he was seeking, viz., agent instead of consul in *England*.

But, my Lords, this point of the age, although it comes in incidentally among the numerous matters they may have inquired into, is not the main or the direct point in issue between the parties. It might make a great difference in collateral matters, which they say they are prepared to prove in consequence of the discrepancy of age between one claimant of this man's property and the other claimant of this man's property. The present suitors say that the point as to age is of considerable importance, but to the Senate, who made the reference to the *Giunta*, of course a difference of five or six or seven years, would be a matter of very slight importance—if any at all—or it might even have been omitted altogether. Probably, as the man had been in their service before his election to his office, it would have had exactly the same result as it did have, for there is no reason to suppose that his election turned in any way on the age of the party brought forward.

On the other hand, my Lords, see what difficulty you get into with regard to the extension of the law as to hearsay evidence—in which you cannot be too particular—if you admit such a document as this to be received as evidence. It appears to me, as I said before, that the *Giunta* was simply a committee. If the document were admitted you might take a committee of any

public body as making statements which you would be entitled to bring in to prove collateral matters which happened to form part of the statement; and if you are to be at liberty to make this statement evidence, you would thereby extend the rule laid down in *Doe* v. *Turford* (1) in a most alarming degree. You would extend it to committees of all public bodies, all municipal corporations—to the reports of the committees of the common council of the city of *London*, to the reports of the town councils in all the different departments of the kingdom—all these might be brought forward as containing statements which it might be assumed were to be inquired into, and so be made part of the evidence in any particular case.

Now, my Lords, what proof have we in any way of any such steps having been taken by this *Giunta*, as would be required in order to establish the fact by way of proof, or to establish evidence of any value whatever, with reference to the particular controversy which is now going forward. Many other cases must have been inquired into besides that of this gentleman. Some questions put by my noble and learned friend on my left will shew at once into what sort of inquiry you may be launched in matters of this kind. You might take eight, nine, or ten different candidates for an office at the disposal of some municipal corporation, and a reference by the corporation might be sent to a committee of its own body to report which was the best candidate, and among other matters in bringing forward the report of the committee to the employers, you might find a statement of the age of the person whose appointment is in question.

In this case I must say that I have looked in vain for any evidence of there being any investigation such as could be denominated, in any sense according to our views, evidence, in this country. So far from it being shewn that the *Giunta* took any steps by the examination of witnesses, or the like, or the examination of baptismal certificates, or by inquiring from any member of the family so that the declaration of that member might be treated, although not on oath, as a declaration that might be introduced, there is not only nothing of that kind established before us, but on the contrary, from what we know of what took place in

(1) 3 B. & Ad. 890.

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Hatherley.

some similar matters, in the reports of commissions which were directed to some particular end, and happened casually to mention certain events, we know pretty well that no such rigorous investigation was entered into in those cases. There is not much probability that they had called together witnesses from the family and had inquired where he was born, what was his age, and the like, those being the best persons to know anything at all on the subject. Not only is there no evidence on the subject, but there is nothing to lead one to presume that any such step was taken.

Then, my Lords, I do not think this comes near the case of the heralds' books, nor the commissions for making specific inquiries, these specific inquiries falling plainly under the head of a discharge of a duty, which duty is discharged in the only proper manner in which it could be discharged, and, therefore, the law taking notice that such had been the course of investigation and inquiry, and such had been the result of the due execution by the commission of that duty, gives credit to what the return states upon the matter; although even there the extent to which evidence has been admitted seems to be limited by *Doe* v. *Turford* (1), and very narrowly limited, to the question itself, and the actual certainty of its being an entry contemporaneous with the duties so discharged. That case has been still more narrowed (some think, perhaps, too much so, and others not enough) in *Chambers* v. *Bernasconi* (2).

But here there is nothing approximating to any one of those cases, and, if you accepted the argument on behalf of the Appellants, you would at once have a flood-gate opened to a large mass of documents which are not always remarkable for the ascertainment of truth—public commissions, and so on, without the least narrative of how those reports were arrived at, or the evidence on which they were arrived at, or anything whatever to satisfy you that you had an authentic report made by the persons in the discharge of a duty, and the report entered at the time the duty was discharged.

My Lords, I should have been glad to find any case that would have assisted in the investigation of truth, because one is very grieved at all times to be obliged to enter upon the consideration

(1) 3 B. & Ad. 890. (2) 1 C. M. & R. 347; 4 Tyr. 531.

of the admission of evidence with so much caution and so much suspicion. But unfortunately the habits of mankind are not such, at present, as to lead one to desire any extension of the privilege of having evidence given and taken as part of the *res gestæ* of that which is sought to be proved, when you do not find any of the ordinary safeguards of evidence, namely, the examination of witnesses in person. There is no such safeguard as that, and no power of cross-examination, and it is only from the difficulty which has arisen in some particular cases from adhering with the utmost rigour to the rules with regard to hearsay evidence that, in the classes of evidence which I have been referring to, and which have been cited before us in argument, exceptions from the rule applying to hearsay evidence have been established. My Lords, I do not think we ought, in a case of this character, to extend the exceptions to cases where we have never yet found them applied, and when it is so easy to foresee extreme hardship, and possibly utter failure of justice, which would arise from such an extension of the exceptions. I think, therefore, my Lords, on the present occasion the course which the Court below took in excluding this document was right, and I, therefore, concur in thinking that the decision of the Court below ought to be affirmed.

LORD BLACKBURN :—

My Lords, I am also of the same opinion. In deciding the present question I assume—what I believe is a matter of controversy—that this document is a genuine document, actually being what it purports to be, and satisfactorily proved to be what it purports to be.

My Lords, having stated that, I inquire whether or not it is admissible evidence, (its weight is another question,) to prove that the consul *Mangini*, about whose next of kin the inquiry is, was born at *Quarto* in a particular year. That is what it amounts to in the result. It may be some evidence of more or less weight tending towards that, but I do not think it is evidence of it, and I will proceed to state the reason why.

I shall not attempt in so doing to enter upon a full inquiry into the law of evidence. I do not believe it would be possible, and I do not believe it would be proper in such a case, because one

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Blackburn.

might be inadvertently ruling disputed points. But, so far as it is necessary to decide this case, one must express an opinion. It is not disputed that the general rule of English law is that hearsay evidence is not receivable, one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those.

Now, my Lords, the first and one of the most important exceptions is briefly expressed in a dictum in *Higham* v. *Ridgway* (1), that documents on the face of them appearing to be against the interest of a deceased person who stated the matter, are evidence. I need not enter into the qualifications of that farther than to point out that in no point of view can this *Giunta di Marina* who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests.

Then, my Lords, there is a second class of cases, of which *Price* v. *Lord Torrington* (2) may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There again I do not go into the qualifications, or express any opinion upon the different matters introduced, farther than to point out that in no sense can it be said that the *Giunta di Marina* was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle.

Then, my Lords comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible—where it is a public right or a *quasi* public right, evidence of reputation is admissible if you prove that the

(1) 10 East, 109. (2) 1 Salk. 285; 2 Ld. Raym. 873.

deceased person was of the class who would know it, and had stated it. Upon that again I merely say that the question we are now inquiring into, viz., the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

Then, my Lords, there is another class of cases which comes nearer to it. It has been established for a long while that in questions of pedigree,—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice,—but for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by shewing that they actually made the statements, but by shewing that they acted upon them, or assented to them, or did anything that amounted to shewing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

Now if, in this case, there had been any evidence whatever shewing that *Mangini* himself had told this *Giunta di Marina* that he was born at *Quarto* in a particular year, that would clearly have been evidence, if it was believed to be genuine; indeed it would have been almost irresistible evidence. But there is not the slightest pretence for saying he did so. His written communication to the Genoese Government does not say a word about where he was born, or his age. He did not think it material or necessary when he was seeking to be appointed agent, to tell them. If it could be shewn that the *Giunta di Marina*, when making this inquiry, and prepared to make this report to the Government, had asked *Mangini* the question, the statement would have been taken as evidence to shew that *Mangini* had said it. Or if it could be shewn that the *Giunta* had asked other members of the family, and that they had said it; that might be evidence. It might be a question of how that could be shewn, but if that was shewn upon admissible evidence, then it would become a question

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Blackburn.

whether it would be itself admissible evidence on the ground that it was a statement by a member of the family. But there is no pretence for saying that any one of these things is proved. What does appear is that the *Giunta*, for some reason which I cannot tell, thought (I give them credit for really thinking so) that this *Mangini* had been born at *Quarto*, and was now forty-five years of age, and they wrote that down. Upon no principle that has hitherto been stated could that be admissible evidence.

But, then, there comes another class of cases on which the argument principally rested; for it is only within that class of cases that the learned counsel for the Appellants in their able argument have made any serious struggle to shew that this document is admissible. It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr. Baron *Parke* said in delivering the opinion of the Judges in the case of *The Irish Society* v. *The Bishop of Derry* (1). His Lordship there says (2), "The fifth exception related to an entry in one of the books of the First Fruits Office of the collation and admission of *John Freeman* to the Rectory of *Camus*. Writs were issued from the Court of Exchequer to the bishops to ascertain the value of the first fruits and twentieths, and returns were made by the bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returns. We think the entry was properly received." That was the point decided—that the writs having been issued to the bishop to return the first fruits in his diocese, and the return of them being presumably lost, as it could not be found, the entry in the First Fruits Office (the copy of it) was good secondary evidence of the return. Of course, that involved in it that the return itself would be evidence. Then his Lordship says, "The writs related to a public matter—the revenue of the Crown, and the bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received.

(1) 12 Cl. & F. 641. (2) Ibid. at p. 668.

It was contended that the bishop could not be permitted to make evidence for himself" (that is one objection which he meets) "and, therefore, that the entry though admissible between other parties was not to be received for the bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance, *Merrick* v. *Wakley* (1), and the receipt of a certificate in a parish book, *Rex* v. *Debenham* (2), which have been rightly held to be inadmissible for the surgeon in one case, or the parish keeping the book in the other. But neither of these was an entry of a public nature, in the proper sense of that word; the former was a memorandum, intended to operate as a sort of check to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights with relation to another." Then he goes on to say, "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not." Then he puts the case of the person who made a marriage register turning out to be interested, and says that would not prevent the register being received as evidence.

Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be

(1) 8 A. & E. 170. (2) 2 B. & Ald. 185.

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Blackburn.

quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

In many cases, entries in the parish register, of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were "public" then, because the Common Law of *England* making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, ever after.

Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence, on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *primâ facie*, to have known and to have spoken the truth. I am not aware of any decision which says that, in such a case as I have supposed, the document would be received. I do not believe any one has ever tried to put in such a document, and therefore I do not think there is or can be any authority to the contrary. Nevertheless that would illustrate the principle.

Every other case that I am aware of falls within the principles of one or other of the limitations I have stated. The visitations of the heralds were proof. There the Court of Chivalry was a

prescriptive Court, and the object of the Court of Chivalry and the inquiry of the heralds—I do not stop to inquire whether the heralds were independent officers, or a branch of the Court of Chivalry, and it matters not—the very object and purpose there was, that they should inquire into arms and pedigrees for the very purpose of making a register of them, and for both these reasons it is clear that, when the visitation of the heralds appointed for these purposes had been made, those things could be, and they always have been received as evidence. There seems to be some misapprehension that they were received in committees of privileges as to peerages on the ground that there was some peculiar rule there. They were received, as was proved by several of the cases cited, on trials at *nisi prius* where evidence of pedigree was required. Here I may observe that in all these cases, where you have got the means, by a public document, of proving a fact, the question whether that fact is of importance or not must depend on the subject of the inquiry. If the document proves that a deceased member of the family had authenticated a pedigree, of course that becomes as strong evidence as you can have, if pedigree was the subject of the inquiry there.

I rather think that in one or two of the cases mentioned in peerage inquiries about the funeral certificates, that was the ground of the decision. I rather think, but I should not like to be too sure about it, that the book of the heralds which was produced had a copy of all the certificates of the funerals which had been returned by those who attended the funerals; and the case in *Shower's* Parliamentary Cases (1) shews what the practice was of heralds attending the funerals of great men. I think the effect of what was decided was that that was good secondary evidence of the certificate, just as in the case of *The Irish Society* v. *The Bishop of Derry* (2) it was decided that the First Fruits Book was good secondary evidence of the returns. Then, it being established in the Peerage cases that there was a certificate signed as required by the Earl Marshal, by the executors, in both the cases which were cited, that certificate when produced did state on the face of it, that the executor who signed it was a near relation,

(1) *Oldis* v. *Donmille*, Sh. P. C. Ed. 1698, p. 58, at p. 65.
(2) 12 Cl. & F. 641.

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Blackburn.

I think in the *Vaux Peerage* he appeared to be a son, and in the other he appeared to be a near relation, I say, taking them to be signed in that way, of course the document that was produced became extremely cogent evidence of pedigree. It would not probably have been evidence of any thing else—not of reputation. It might have been evidence of reputation where reputation was admissible, but it was only because pedigree was the subject of the inquiry.

Frequently in the cases cited, or many of them, half-a-dozen different reasons have been given, which might be all good or bad, for admitting the evidence. Take, for instance, the case in the third volume of *Campbell* of *Price* v. *Littlewood* (1), where the question being about a private right to a pew, the Judge admitted the entry and gave two reasons, saying, first of all, that it was evidence of reputation. I confess I think that was a mistake. I do not see how the ownership of a pew can be a matter of reputation; perhaps I am wrong. Then, secondly, he said that it was a public document. Now, I have considerable doubts whether the entry in the vestry there, was public enough to make it a public document, but it might be that the entry in the vestry was intended for the information of all the parishioners who liked to come and see it. Supposing, in the case of *Arnold* v. *The Bishop of Bath and Wells* (2), the entry had been made by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before, *secundum consuetudinem*, and suppose it was wrong to admit him, that falls completely within the principle which I think the case of the *Irish Society* v. *The Bishop of Derry* (3) establishes. It seems to me that it is clearly within that principle. The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.

Now, my Lords, taking all that into consideration, can the document in this case be said to come within that class of cases?

(1) 3 Camp. 288. (2) 5 Bing. 316.
(3) 12 Cl. & F. 641.

I think it is impossible to look at it in that way. There is not the slightest evidence, or the least circumstance, to lead me to the conclusion that it was even intended that this private and confidential report should be seen by *Mangini* or anybody interested in it. It was meant for private information, to guide the discretion of the Government. It was not like the bishop's return of the first fruits, for the public information, to be kept in the office and to be seen by all in the diocese who might be concerned when there came to be any litigation. But this was meant as a private and confidential report, and it certainly seems to me according to common sense that it ought not to be received. But I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.

LORD WATSON:—

My Lords, I also am of opinion that this document is not admissible as evidence. I listened with very great pleasure to the argument at the Bar, which, so far as I was concerned, was a very instructive one; but I noted in the course of the argument, whilst the law on various points was very fully elucidated, the difficulty, that the Appellants' counsel had to contend with throughout, was to bring the facts of their case within the rule of any of the authorities which were cited by them.

My Lords, I concur in the views which the noble and learned Lord on the woolsack and the noble and learned Lord opposite have expressed as to the difference between this case and the cases dealt with in those authorities. I do not think it necessary to make any farther reference to them, because, being of opinion that the present case is not ruled by them; I must deal with this case upon its own merits.

Now, my Lords, I have not been able to find in the authorities cited, any warrant for holding that secondary evidence is admissible according to the law of *England*, where there exists no reasonable presumption that the statement offered in evidence was derived, either from the personal knowledge of the party who made it, or

H. L. (E.) 1880 STURLA v. FRECCIA. Lord Watson.

from some legitimate source—I mean legal evidence. I think in all those cases where it is admissible, secondary evidence is admitted as a substitute for primary evidence, and can only be received when it plainly appears to be either directly drawn from that which would have been primary evidence, or drawn, not directly, but by some one competent to infer the result, from legal evidence under his consideration.

My Lords, one of these presumptions, I think, is excluded by the circumstances of this case, I mean personal knowledge on the part of those members of the committee who drew up the report of 1790. On the other hand, it does not appear to me that either the terms or the character of the report, warrant the suggestion that there was legal evidence before the committee, upon which the members of that body arrived at the results which they reported for the benefit of those who were appointed to exercise an act of patronage.

My Lords, it does not appear to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making any *quasi*-judicial or strict inquiry into the circumstances which they were about to report. I do not think that the duty cast upon them differs in the slightest degree from the duty which is incumbent upon every department of state, or individual officer of state, to whom is entrusted the patronage of Government office. It is their duty to satisfy themselves that the person whom they are about to appoint is fitted and qualified for the office which they are about to confer upon him; and, where there are several candidates, it is their duty to make up their minds, upon a fair estimate of their various qualifications, which shall be preferred to the office. It is quite competent, as is the case here, for any person entrusted with the right of patronage to delegate that duty, as has been done here, but that does not appear to me by any means to alter the character of the duty, or the character of the inquiry which that duty involves, in order to its being satisfactorily performed.

Now, my Lords, I venture to say there is nothing here to suggest, and there is nothing in any analogous case in my power to suggest, which involves the duty of proceeding according to strict legal rules. The sort of commission that was given here was one

of a very roving description, to find out every little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. Accordingly we were referred to various documents of similar character; and those by their tenor very strongly support the view that the inquiry made was of the character that I now state. They were not appointed to inquire into any specific fact; they were not appointed to inquire into age, or place of birth; and accordingly in many cases they obviously did not so inquire, as they do not report these particulars.

My Lords, I cannot conceive, when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register, that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document intended for a temporary purpose of this kind, is found, after a long lapse of years in the archives of a Government office, does not constitute it of the authority of a register. The purpose of this document was ephemeral, and was at an end the moment the appointment was made; and it would be a very singular fact if the law of *England* were to give such an authority to this one report, when the investigation in the cases of all the unsuccessful candidates, and the reports in their cases, must have been of precisely the same weight and authority as this; there is no difference between them. The results of the investigations, and the steps taken to investigate, appear to me to have been, in the case of *Mangani* at all events, entirely without the knowledge of the parties concerned.

I have no hesitation, under these circumstances, upon the facts of the case itself, and seeing that no direct authority can be adduced in support of the Appellant's contention, (and no authority which in my mind warrants the principle,) in saying that this is a document which cannot be reasonably presumed to be founded upon legal testimony, and one which cannot be received in evidence. I fully concur in the result which your Lordships have arrived at.

Mr. *Pearson* intimated that he could not support the case if that document was rejected.

H. L. (E.) 1880 STURLA v. FRECCIA.

Mr. *Higgins*:—My Lord, there is a fund in Court of £2000 which was paid in as security for costs. I do not know whether your Lordships can give any directions about that.

THE LORD CHANCELLOR:—The appeal will be dismissed with costs. Any fund deposited by way of security for costs will remain in its present position until the costs are paid; and if the costs should not be otherwise paid, or if both parties should agree in an application to the Appeal Committee to deal with that fund, that would be the proper mode of doing it. I do not think that it would be the proper course for the House to make an order now.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 18th June, 1880.

A petition was afterwards presented by the Respondents praying that the Clerk of the Parliaments might be directed to pay the sums of £200 and £2000, paid by the Appellants into the Fee Fund as security for the costs of the appeal, to the Respondent's Solicitors on behalf of the Petitioners, in part satisfaction of their costs, and the Agents for the Appellants consenting thereto, It was ordered as prayed.

House of Lords' Minutes, 16th August, 1880.

Solicitors for Appellants: *Lowless & Co.*

Solicitors for Respondents: *G. L. P. Eyre & Co.; Foster & Spicer.*

[HOUSE OF LORDS.]

PETER PITT AND OTHERS . . . . . APPELLANTS;

AND

THOMAS WEBB JONES AND OTHERS . . RESPONDENTS.

H. L. (E.)
1880
May 31;
June 21.

Partition—Sale or Valuation—31 & 32 *Vict. c.* 40, *ss.* 3, 5.

Owners of three sixteenths of a property sought to have a sale of it; owners of thirteen sixteenths of it objected to a sale and offered to purchase the shares of the others at a valuation. In the Court of the Vice-Chancellor a valuation was ordered under the provisions of the 5th section of the 31 & 32 Vict. c. 40. The Court of Appeal decided that the case fell under the 3rd section of that Act, that the 5th section did not qualify or control the 3rd, nor operate as a proviso upon it, and so the decision below was reversed, and a sale was directed:—

Held, by LORD BLACKBURN and LORD WATSON (LORD HATHERLEY dissenting), that the decision of the Court of Appeal was correct, and must be affirmed.

A party asking for a sale is not compellable to part with his share on a valuation.

APPEAL against a decision of the Court of Appeal, which had reversed a previous decision of Vice-Chancellor *Malins* (1).

The Appellants and Respondents were interested in certain land and house property in *Birmingham*, and an action was brought in January, 1876, by *Gilbert* (since deceased), and *Jones*, and certain others, to have a sale of the property under the direction of the Court. The Defendants were desirous of retaining their shares, and offered to purchase the Plaintiffs' shares. The question raised between the parties depended on the construction that ought to be put upon the 3rd and 5th sections of the 31 & 32 Vict. c. 40, the *Partition Act*, 1868. The shares appeared to be very numerous, but practically it was understood that the whole might be divided into sixteenths, of which the Plaintiffs were entitled to three sixteenths and the Defendants to the remaining thirteen sixteenths. Vice-Chancellor *Malins* had held that the case came within the 5th section of the Act (although it satisfied

(1) *Nom. Gilbert* v. *Smith*, 8 Ch. D. 548; 11 Ch. D. 78. There had been a previous decision on a point of practice, 2 Ch. D. 686.

H. L. (E.) 1880 PITT v. JONES.

the conditions of the 3rd section), and upon some of the Defendants undertaking to purchase, a valuation was directed to be made in Chambers, and purchase and sale thereon. The Plaintiffs who sought to have a sale by auction appealed, and the Court of Appeal decided that the 3rd section was not controlled by the 5th section; that the number of parties interested, and the nature of the property, were such that the Court was of opinion that a sale would be beneficial to all parties, and therefore reversed the decision of Vice-Chancellor *Malins*, and directed a sale with power to all parties, except those having the conduct of the sale, to bid.

This appeal was then brought.

Mr. *J. Pearson*, Q.C., and Mr. *Bardswell*, for the Appellants:—

The parties having the least interest in the property here ask for a sale; the parties having the greatest interest in the property object to a compulsory sale, and offer to take the other shares at a valuation. That gets rid of any necessity for a sale. The case of *Pemberton* v. *Barnes* (1) is not adverse to the Appellants, for there each party was entitled to a moiety, and Lord *Hatherley* thought that under such circumstances it was, under the 4th section, imperative on the Court to order a sale. But all his Lordship's observations shewed that, except for such a cause, the sale need not have been ordered, and that if the case had fallen within the 5th section it would not have been ordered, but that a valuation would have been directed. He thought that the 5th section qualified the directions of the 3rd section, though it might not overrule the positive enactment of the 4th section where two parties, each claiming a moiety of the estate, were in contest. That case, therefore, is not opposed to the Appellants. Nor does that of *Drinkwater* v. *Ratcliffe* (2) affect this case, for there the party objecting to the sale, being a married woman, and her husband not joining with her, she could not give a valid undertaking to purchase at a valuation. A sale was therefore inevitable. Here the Appellants are willing to give the undertaking, and are able to give it; and the 5th section, controlling the effect of the 3rd section, authorizes the Court in case of such undertaking being granted, to order a valuation of the share of the party

(1) Law Rep. 6 Ch. Ap. 685. (2) Law Rep. 20 Eq. 528.

requesting the sale. The case of *Williams* v. *Games* (1) does not apply here, for the Appellants do not ask for a partition, but, objecting to a sale by auction, they ask for a valuation and are ready to purchase, and under the 5th section they are entitled to that, for if the Court has the power to order a sale unless the parties objecting to it are willing to purchase, it is clear that if they are willing, no such sale is to take place. Here they are willing.

Mr. *Bristowe*, Q.C., and Mr. *Lewin*, for the Respondents:—

The property here is now only of a certain value. From the alterations which are going on in this part of *Birmingham* that value will be much increased if the property can now be sold. The Court is therefore asked, on the ground that it will be for the benefit of all parties concerned, to direct a sale and not a valuation. The *onus* of proving that there ought not to be a sale lies on those who object to it. That *onus* is not discharged here. *Porter* v. *Lopes* (2) shews that in a case like the present, unless the Court saw good reason to the contrary, a sale must take place. There is no "good reason to the contrary" here. The order for a valuation must be inoperative, for *Williams* v. *Games* (1) decides that the Court has no power, under the 5th section of the Act, to order that the part owner who asks for a sale shall sell to the others at a valuation. And in *Pemberton* v. *Barnes* (3) it was held that the words of the 4th section rendered it imperative to order a sale, and that was the principle acted on in *Roughton* v. *Gibson* (4), which also decided that the Court was to exercise a discretion for the benefit of all the parties. The Act was passed to remedy the inconveniences and almost inevitable injustice of partition, and it was felt that the best way to effect that purpose was to give the Court a power to order a sale. In all instances the Courts had taken the circumstances of the case into consideration, and the circumstances here pointed clearly to the advantage, for all parties, of a sale, and therefore best effectuated the purposes of the statute.

Mr. *Glasse*, Q.C., Mr. *W. W. Cooper*, Mr. *Woodroffe*, and Mr.

(1) Law Rep. 10 Ch. Ap. 204.
(2) 7 Ch. D. 358.
(3) Law Rep. 6 Ch. Ap. 685.
(4) 46 L. J. (Ch.) 366.

H. L. (E.) 1880 PITT v. JONES.

Davenport, were for other parties interested, but did not address the House.

Mr. *Bardswell*, in reply.

LORD HATHERLEY:—

My Lords, the question in this case arises on the *Partition Act*, 1868. The Appellants and Respondents, or some of them, are entitled as tenants in common to property which all parties now desire to have divided or sold; but the question is whether the whole should be sold under the powers conferred by the Act upon the Court, or whether the Respondents are entitled to buy out the interest of those who ask for a sale, and to retain the property as a whole. It is admitted that a sale would, in point of value, be more beneficial to all parties than a partition of the property, but the application for a sale has been made to the Court under the Act by those who are entitled to less than a moiety of the estate, while others are desirous of retaining their whole shares.

It will be well to notice the general scheme of the Act, and the assistance which it proffered to persons entitled to interests held in common, towards disengaging their shares. Before this statute, tenants in common could, by filing a bill, claim partition as of right, but they could not, except by the consent of all, sell and dispose of the estate as a whole. If any of them were under disability, such consent could not be had. The first provision to be made, therefore, was to empower the Court to sell. For this purpose it was necessary that the Court should be able to bind parties under disability, and to overrule the dissentient parties, where it should seem desirable that the property should be sold as a whole. But this must obviously be done with a due regard to the common interests of all.

It appears to me that in construing the Act we must consider its intention in giving all these powers, to be the guiding clue to its construction, and I think that the 3rd, 4th, 5th, and 6th sections of the Act effectuate the above purposes, all of them having the common object of facilitating a sale. The 3rd section states with what objects the power of sale is conferred, what shall be the power, and at whose request it shall be conferred. In view

of the objects there mentioned, and on the application of any party interested, and notwithstanding the dissent or disability of others, the Court may sell absolutely.

But it was foreseen that the concurrence of all the parties interested was not always to be expected, and, therefore, the 4th section provided for the case of one half or more of the owners concurring in the application, and in that case enjoined a sale, without leaving any farther discretion to the Court than the duty of seeing that there was no good reason why a sale should not be had. The 5th section, as it seems to me, enacts that the sale might be made by the Court in all cases (in the same words, observe, as in sect. 3) unless the opposing parties should undertake to buy out at a valuation the interests of the party proposing a sale, in which case the section prescribes imperatively the mode of making the valuation. The 6th section farther provides for giving to any of the owners liberty to bid, subject to the regulation of the Court.

The above construction gives effect to each of the above sections (3rd, 4th, 5th, and 6th), and does not require as to any of the sections that any words should be added or struck out. I do not for a moment doubt that the Act might have been made more clear, and the difference of opinion that has been shewn in the few authorities cited, is sufficient to test this. I, after much consideration of one of the cases, *Pemberton* v. *Barnes* (1), took a different view from that taken by a learned Vice-Chancellor and by the Master of the Rolls, in other cases, as in the present. Other very learned Judges have taken a different view from mine. I have carefully reconsidered what I then said, and I would now refer to it as my present opinion.

I think that a construction which authorizes a sale under the 3rd section, and allows no effect to the provision for a sale being made conditional under the 5th section, is wrong. It is only a power given to sell, unless the undertaking is given. If I say, "You may sell my house for £1000 to-morrow, unless more is offered to-day," and such higher offer should be made, the power of selling is fettered and arrested, as it is here, by the valuation. A contrary construction converts the conditional power of sale into

(1) Law Rep. 6 Ch. Ap. 685.

H. L. (E.) 1880 PITT v. JONES. Lord Hatherley.

an absolute power, and renders the whole provision for staying a sale by buying out the interest of the applicants for sale, into a nullity, nor does the reasoning of the Master of the Rolls in *Drinkwater* v. *Ratcliffe* (1) reconcile me to the construction he has there elaborately enunciated. It is difficult to say when the 5th section can take effect, if it be not in a case like the present, or for what purpose a sale is to be arrested, and a valuation be first provided for, if a person holding one-fiftieth share could compel a sale under the 3rd section, if the Court allows it, whether the holders of the other forty-nine parts are willing to pay him out or not.

I think, therefore, that the decree of Vice-Chancellor *Malins*, in the case before us was right, and ought not to have been reversed, but that it should be restored by the decree now to be made by your Lordships, and the decree complained of should be reversed with costs; but as I believe my noble and learned friends differ from me, I suppose the order must be an affirmation, and the appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, this case is now reduced to a short point, but one of considerable difficulty.

This was a suit for partition where, before the *Partition Act*, 1868, a decree for partition might have been made. It is now admitted that it appears that a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them; and parties interested, who hold less than a moiety of the property, have requested the Court to direct a sale.

Some of the other parties interested offered to undertake to purchase the share of the party requesting a sale, and the Vice-Chancellor ordered a valuation of the share of the party requesting a sale.

That party objected to this, declaring that, if he might not have an open sale of the whole, he would withdraw his request for a sale, and leave the suit for a partition to proceed exactly as if no such

(1) Law Rep. 20 Eq. 528.

request had been made. The Vice-Chancellor overruled this objection and made an order. On appeal the Court of Appeal sustained the objection, and made an order for a sale of the whole property.

If it was right to order the whole property to be turned into money by a sale, there are all proper provisions for allowing the parties to bid and make offers, and no complaint is made of the order in respect of those matters. The question raised by the appeal is, whether, under the circumstances stated, the Court of Appeal was right in ordering the sale of the whole. That depends on the construction of the 3rd, 4th, and 5th sections of the *Partition Act*, 1868, which are not so clearly expressed as to prevent a difference of opinion; and I am sorry to find that I differ in opinion from the noble and learned Lord now on the woolsack (Lord *Hatherley*).

There is authority upon the question. In *Pemberton* v. *Barnes* (1), in 1871, Vice-Chancellor *Malins* put a construction on the 4th section of the Act which, on appeal, was reversed by the Lord Chancellor (Lord *Hatherley*). The Lord Chancellor had to construe the 4th section, but in so doing he expressed an opinion as to the construction of the 5th section, which, though not the precise point before him, was by no means irrelevant to the construction of the 4th. He says (2): "If we then look to the 5th section we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections. A wide discretion is given to the Court. The Court may think that a sale under the 3rd or 4th section is rather hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the Court can give them liberty to do so." And I think that the opinion thus expressed by Lord *Hatherley*, as Lord Chancellor, was one in favour of the present appeal.

The next case was *Williams* v. *Games* (3), in February, 1875. There, in a partition suit, it did not appear that the sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property

(1) Law Rep. 6 Ch. Ap. 685. (2) Ibid. at p. 693.
(3) Law Rep. 10 Ch. Ap. 204.

H. L. (E.) 1880 PITT v. JONES. Lord Blackburn.

between them. But two holders of one-seventh part, being less than a moiety, requested a sale. The proprietors of five-sevenths offered to undertake to purchase their two-sevenths at a valuation. The Master of the Rolls made an order that the two should convey their sevenths at a valuation; one of them appealed, contending that his request was for a sale of the whole, and that if he might not have that he withdrew his request, and that the section did not give power to the Court to order him to part with his share at a valuation. The Court of Appeal, consisting of Lords Justices *James* and *Mellish*, set aside the order of the Master of the Rolls, and ordered a usual partition decree. The judgment of Lord Justice *Mellish* is very short, but I think it sufficiently appears that the construction he put upon the 5th section was one favourable to the Respondents in this case.

Next comes *Drinkwater* v. *Ratcliffe* (1), in July, 1875. The facts there did not call for a decision on the construction of the 5th section; for the person offering an undertaking to purchase the share of the person requesting a sale, was not capable of entering into one. But the Master of the Rolls went very fully into the question of the construction of the whole Act. And his reasoning in that case is adopted by the Court of Appeal, consisting of the Master of the Rolls, Lord Justice *James*, and Lord Justice *Bramwell*, as the ground of the judgment now appealed against. No other authority was cited bearing on the subject, and I believe there is no other.

I do not think it can properly be said that the construction of the Act was settled by authority, even in the Court of Appeal before this case was decided, and it is to me clear that it is not settled in your Lordships' House; but the balance of authority is in favour of the Respondents. And though, if I thought that the Master of the Rolls and Lords Justices *James*, *Mellish*, and *Bramwell*, were all mistaken, I should feel bound to say so, I should do so with much diffidence, though fortified by the opinions of Lord *Hatherley*, as Lord Chancellor, and Vice-Chancellor *Malins*. But treating all that has been said in the Courts below as arguments to be weighed, not as authorities to bind, I put the same construction on the Act as that put on it by the Court below. My reasons

(1) Law Rep. 20 Eq. 528.

are nearly the same as those given in *Drinkwater* v. *Ratcliffe* (1); but I will state them in my own words.

Each one of the three sections begins with the same phrase, "In a suit for partition where if this Act had not been passed a decree for partition might have been made then——" They are, in form at least, independent enactments, though, no doubt, all to be construed together. The 4th and 5th sections are not, either of them, in form at least, nor, as I think, in substance, provisoes on the 3rd, though it comes first in order. Indeed I think the intention would have been more obvious if the order in which the enactments have been placed had been reversed, and the 5th section placed as 3rd, and the 3rd as 5th. Sect. 5 says, that in every case of a suit for partition (whether the sale would or would not be more beneficial for the parties than a partition), if any party (whether owning more or less than a moiety) requests a sale, the Court shall have a discretion to order such a sale, unless the parties opposing a sale are willing to take his share at a valuation. But it does not say, nor do I think it was intended to say, that a party who requests a sale of the whole must take that valuation; I think it means that if a party presses for a sale, and the Court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common law right to a partition. This is what was decided in *Williams* v. *Games* (2), and is what I understand to be the opinion of Lord Justice *Mellish* in that case.

But, I think, the party declining to accept this undertaking for a valuation is not hereby prevented from pressing for a sale under the other sections of the Act if he can bring himself within them. The Court cannot, under sect. 5, order a sale merely on the request of a party if the opposing party is willing to buy him out. It may make such an order under the 3rd section if the case is brought within it. It must, under sect. 4, unless it sees good reason to the contrary, do so where the party requesting a sale is owner of a moiety or more. This was the construction put upon

(1) Law Rep. 20 Eq. 528. (2) Law Rep. 10 Ch. Ap. 204.

H. L. (E.) 1880 PITT v. JONES. Lord Blackburn.

sect. 4 in *Pemberton* v. *Barnes* (1). I see that in this case Vice-Chancellor *Malins* says he still thinks the view he took of the construction of that section preferable to that put upon it by the Lord Chancellor. I cannot agree with him; but the Lord Chancellor (Lord *Hatherley*) did express an opinion that the 5th section was applicable to proceedings under the 3rd and 4th sections, and was intended to give the Court a discretionary power to prevent a sale under these sections if the opposing party was willing to bind himself to take the Applicant's share at a valuation; and this is contrary to the opinion I have just expressed. I think if this had been intended it would have been properly expressed in the form of a proviso on the 3rd and 4th sections, and not by a fresh substantive enactment; and it would have been properly expressed by saying that the Court *shall not* direct a sale *if* the other parties undertake, &c., and not by saying that the Court *may* direct a sale, *unless*, &c. But I cannot think it was intended; a sale by valuation is a very different thing from an open sale, and I do not see why a party should be forced to sell his property at a valuation; and I think the words used here give him an option to accept such a valuation, if offered to him, but do not compel him to do so.

I therefore come to the conclusion that the order appealed against is right, and should be affirmed, and I move that the decree appealed against be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, this appeal is taken in a suit for the partition of certain heritable estate in *Birmingham*. The Appellants' interest in the property extends to thirteen sixteenths, the remaining three sixteenths being vested in the parties now appearing as Respondents.

The Respondents desire and assert their right to have a sale of the property and distribution of the proceeds amongst the parties interested, in terms of sect. 3 of the *Partition Act*, 1868; and in the event of their failing to obtain that remedy, they insist upon their common law right to have the property divided.

(1) Law Rep. 6 Ch. Ap. 685.

The Appellants hardly dispute that the circumstances of the case are such as fairly to bring it within the provisions of sect. 3; and I understood them to concede in argument that had that clause been the sole enactment of the statute, it would have been proper for the Court to direct a sale. They contend, however, that, under sect. 5, the Court possesses the power—which it ought to exercise—of directing that there shall be no sale, in respect of their willingness to give an undertaking to purchase the Respondents' shares at a valuation.

The whole contention of the Appellants hangs upon the proposition that sect. 5 gives the Court a discretionary power, in cases falling within the scope of sect. 3, to refuse decree of sale, and in lieu thereof to order the party desiring sale, to sell his share at a valuation, to one or more of the other parties interested, provided he or they give an undertaking to purchase. It therefore becomes necessary to consider how far that proposition is well founded.

Before the passing of the *Partition Act* the Respondents would have had an absolute right to a decree of partition; and it appears to me that the leading purpose of the Act, as disclosed in sects. 3, 4, and 5, was to enable the Court to substitute, in certain cases, sale and distribution for division, which was the only remedy previously competent. The new remedy thus given is, in reality, another form of partition, those interested taking their individual shares in money instead of in specie. Sect. 3 confers upon the Court power to direct a sale whenever it is satisfied that sale will be more beneficial for the parties interested than division. Sect. 4 is an imperative enactment to the effect that if parties interested to the extent of one moiety or upwards request a sale, the Court shall order a sale, "unless it sees good reason to the contrary." This section will obviously apply to a large class of cases in which the Court is not satisfied that the preponderance of benefit is in favour of a sale, and which cannot, therefore, be brought within the provisions of sect. 3.

Thus far the construction of the Act is not attended with much difficulty, but the language of the 5th section is sufficiently ambiguous to have occasioned a difference of judicial opinion in regard to its real import. The point raised in this appeal has not, in my opinion, been previously decided; but it has been discussed and

H. L. (E.) 1880 PITT v. JONES. Lord Watson.

made the subject of judicial comment in several cases arising under the *Partition Act*.

The view taken by the noble Lord now on the woolsack (Lord *Hatherley*), when deciding, as Lord Chancellor, the case of *Pemberton* v. *Barnes* (1) was, as I read the judgment, to the effect that sect. 5 is in substance a proviso on sects. 3 and 4, and that it confers upon the Court a discretionary power, when it thinks that a sale under either of these two sections would be hard upon parties who are anxious to avoid a sale, to give them liberty to buy the shares of the parties requesting a sale.

A contrary opinion was expressed by the Lords Justices *James* and *Mellish* in the subsequent case of *Williams* v. *Games* (2), and by the Master of the Rolls (Sir *George Jessel*) in the still later case of *Drinkwater* v. *Ratcliffe* (3). These learned Judges adopt the view that sect. 5 is an independent clause giving an entirely new power to any party who is prepared to sell his own interest, to insist for and obtain a decree of sale unless some one is willing to buy his share, but not giving power to the Court to compel any party interested to sell his share at a valuation.

In the present case the Vice-Chancellor (*Malins*), following the authority of the noble Lord now on the woolsack (Lord *Hatherley*), decided in favour of the Appellants' contention. But in the Court of Appeal, the Master of the Rolls, with the concurrence of Lords Justices *James* and *Bramwell*, adhered to the views which he expressed in *Drinkwater* v. *Ratcliffe* (3), and accordingly the Court made an order for the sale of the property, with leave to any of the parties interested, not having the conduct of the sale, to bid and become purchasers as provided for in sect. 6 of the Act.

The question raised in this appeal has all along appeared to me to be one of great nicety; but having now fully considered it, I have come to the conclusion that the construction of sect. 5 indicated in the cases of *Williams* v. *Games* (2) and *Drinkwater* v. *Ratcliffe* (3) is the correct one. In forming that opinion I have been mainly influenced by these considerations:—first, Sect. 5 is, in form, not a proviso, but an independent enactment, and must be so construed, unless its terms plainly indicate that the contrary

(1) Law Rep. 6 Ch. Ap. 685. (2) Law Rep. 10 Ch. Ap. 204.
(3) Law Rep. 20 Eq. 528.

was intended by the Legislature; secondly, without doing any violence to its language the clause may be read as a new and substantive enactment, empowering any party who has made up his mind to sell his own share at a valuation, to insist for and obtain a decree of sale, unless some of the other parties give an undertaking to purchase his interest; thirdly, that construction not only brings the substance of the clause into accord with its form, but it is entirely consistent with the main purpose of the Act, which, as I understand it, was to introduce a new method of partition by providing for the sale of joint property and distribution of the proceeds; and fourthly, the opposite construction necessarily implies, in my opinion, that in all cases where parties whose interest is less than a moiety come into Court requesting a sale, the Court has power, not only to refuse the remedy which they ask, but to force upon them another and a different remedy, which is in no sense partition. It appears to me that if such power were held to be conferred upon the Court by sect. 5 it might in some cases impede the operation of the statute; because parties having less interest than a moiety would scarcely venture to request a sale in cases clearly falling under sect. 3, seeing they would thereby incur the risk of being compelled to part with their shares in a form not according to their will.

From that construction of the clause which I adopt, it necessarily follows, in my opinion, that the provisions of sect. 5 cannot be enforced, except at the instance of a party requesting a sale, and voluntarily offering, as an alternative, to sell his own share to the other parties interested, at a price to be fixed by the Court, and also that he may retract that alternative at any time before a judicial contract has been completed by these parties, or any of them, giving the requisite statutory undertaking to purchase. The result of retractation will be to deprive him of the right to insist for a sale under sect. 5, leaving him to seek his remedy, either by proceedings under sect. 3 or 4, if he can bring his case within them, or by decree of partition.

In the present case the Appellants neither request a sale, nor do they offer to sell their shares. On the other hand, the Respondents have never offered or consented to sell the shares belonging to them, and in these circumstances I think the provisions of

H. L. (E.) 1880 PITT v. JONES.

sect. 5 have no application, and that, the case being clearly within the provisions of sect. 3, they are entitled to have a decree of sale.

I am accordingly of opinion that the judgment of the Court of Appeal ought to be affirmed.

Decree complained of affirmed; and appeal dismissed with costs.

Lords' Journals, 21st June, 1880.

Solicitors for Appellants: *Letts Brothers.*

Solicitors for Respondents: *Spencer Whitehead; Gamlin & Son; Robinson, Preston, & Stow.*

[HOUSE OF LORDS.]

1880 *June* 21, 24, 25.

THE DIRECTORS, &c., OF THE CITY BANK APPELLANTS;

AND

SAMUEL BARROW AND REUBEN BARROW RESPONDENTS.

Factors Act—Canada Code—Agent—Hypothecation of Property of Real Owner.

Where there is a power, by law, to sell, a purchaser may obtain, from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge.

Barrow was a leather merchant in *London*. *Bonnell* was a tanner in *Canada*. *Barrow* agreed to pay *Bonnell* 1½*d.* per pound for every hide tanned by *Bonnell* in the mode of the country, and *Bonnell* was to procure freight, and send back the hides. *Barrow* sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime *Bonnell* had obtained from the *Toronto Bank* bank advances, on his own account, on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, and the bankers (who had acted in entire ignorance of the transactions between *Barrow* and *Bonnell*) claimed to retain the bills of lading and the hides until their demands were satisfied:—

Held, that, under the circumstances of the case, *Bonnell* could not, under any law, English or Canadian, claim to be a factor or agent of *Barrow* entitled to pledge *Barrow's* goods, and that consequently, the bankers could not set up any title to the goods, as derived from him, against the real owners.

APPEAL against a decision of the Court of Appeal which had reversed a judgment of the Common Pleas Division, in a cause

wherein Messrs. *Barrow* were the Plaintiffs, and the directors of the *City Bank* were Defendants.

The Respondents, Messrs. *Barrow*, carried on the business of leather merchants at *Bermondsey*. The Appellants were the *London* agents of the *Bank of Toronto*, in the dominion of *Canada*. At the time of the transactions out of which the present appeal arose, *Walter Bonnell* carried on the business of a tanner in the province of *Quebec*. He was also a dealer in leather at *Montreal*; he had besides an office in *London*, and traded under the name of *Walter Bonnell & Co.* There was a mode of tanning leather in *Canada* which was supposed to be less expensive and better than that practised in *England*, and by letters which passed between the parties, it was agreed that in consideration of Messrs. *Barrow* paying 1½*d.* English currency for every pound of tanned sole-leather, *Bonnell* should tan all hides, sent from them to him, at the tannery station near *Montreal*, not exceeding in number 250 a week, and should also exercise his best ability in obtaining for Messrs. *Barrow* freight for the leather from the same station to *England*. In the course of 1875 the Plaintiffs sent to *Bonnell* 1816 hides, weighing 38,359 lbs. They were not sent back as expected, and a correspondence ensued on the subject. It was then discovered that *Bonnell* had transferred the bills of lading of the hides to the *Toronto Bank*, to which he had pledged them to cover advances on his own bills of exchange. The shipping and other documents were in the hands of the present Appellants as agents for the *Toronto Bank*. The charge for tanning these hides was alleged to be £559 7*s.* 11*d.*, payment of which was duly tendered with an offer made (through *Barrows'* solicitor) to pay such farther amount in respect of freight and other charges as might be due. The offer was refused, and an action was then brought by the Plaintiffs (now Respondents) to recover the documents under which possession was held and also the hides themselves. The defence was that *Bonnell* carried on at *Montreal* the business of a factor, warehouseman, and consignment agent as well as that of a leather tanner, and that in the former character he had pledged the goods in question.

The case came on for trial before Mr. Justice *Lindley* (without a jury) in December, 1878, and was heard on farther consideration

H. L. (E.) 1880 CITY BANK v. BARROW.

in May, 1879. *Samuel Barrow* deposed that *Bonnell* had never had in his possession any goods of the Plaintiffs for any other purpose than that of being tanned, and then returned, in accordance with the agreement already stated. The effort on the other side was to shew that *Bonnell* had sold hides to or for the Plaintiffs, and that he was to be regarded in the light of a factor or agent. A commission to take evidence in *Canada* had been issued, and six professional witnesses were examined as to the law of *Canada*, three of whom, Mr. *Badgeley*, Mr. *Day*, and Mr. *Barnard*, gave evidence for the Plaintiffs, and Mr. *Laflamme*, Mr. *Ritchie*, and Mr. *Kerr* for the Defendants. Mr. Justice *Lindley* held that *Bonnell* was not an agent for consignment within the meaning of the English *Factors Act*, nor within the meaning of the corresponding articles of the Civil Code of *Lower Canada*, but that the Defendants were according to Canadian Law entitled to the goods and proceeds as pledged to them for valuable consideration by the apparent owner of the goods. On appeal this decision was reversed. This appeal was then brought.

Mr. *Cohen*, Q.C., and Mr. *Roland Vaughan Williams*, for the Appellants:—

They contended that under certain articles in the Canadian Code, 1487 (1), 1489 (2), 2268 (3), and under the provisions of certain Colonial Acts which had followed in a great measure the provisions of the English Factors Acts, the Appellants were entitled to retain these securities until their claims in respect of the bills of

(1) "The sale of a thing which does not belong to the seller is null, subject to the following exceptions. . . . 1488. The sale is valid if it be a commercial matter."

(2) "If a thing lost or stolen, be bought in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing the purchaser the price he has paid for it."

(3) "Actual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title. Prescription of corporeal moveables takes place after the lapse of three years (reckoning from the loss of possession), in favour of possessors in good faith (even when the loss of possession has been occasioned by theft). This prescription is not, however, necessary to prevent reclaimer, if the thing has been bought in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles (nor in commercial matters generally)."

exchange were satisfied. This was clearly a commercial matter, which brought the case within the words of one of the articles of the Code, and *Bonnell* was within another of the articles of the Code a trader dealing in similar articles, and the Code shewed that the spirit of Canadian Law protected transactions of this kind, since possession under such circumstances was, after three years, not merely in a case like the present, where every act of the Appellants had been of an honourable commercial character, but "even when the loss of possession has been occasioned by theft," made complete by prescription. *Bonnell* exactly filled the character of a "*facteur*" under the Canadian Law, or a factor or agent under the English Law, he was a dealer in leather, he was, within the words of the Canadian Act, an "agent entrusted" with these hides, he was allowed to have the actual possession of them; he was expressly authorized to ship them on freight. He was in all respects a mandatory, and the 1701st article of the Code described mandate as a contract by which a person called the mandator commits a lawful business to the management of another. That was precisely what had been done here. To all the world he appeared, therefore, as the person having authority to dispose of these hides at his pleasure. Now, as it was not pretended on the other side that the bankers had the smallest reason to suspect that he had not the absolute control and dominion of this property, they were entirely justified in accepting the transfer of it from him to cover the advances which they had in perfect good faith made to him.

Paterson v. *Tash* (1); *Bell's* Commentaries (2); *Cole* v. *The North Western Bank* (3); *Hatfield* v. *Phillips* (4); *Troplong* (5); *Moyce* v. *Newington* (6); *Cassils* v. *Crawford* (7); *Johnson* v. *Crédit Lyonnais Company and Johnson* v. *Blumenthal* (8); and *Heyman* v. *Flewker* (9) were cited and commented on.

The Solicitor General (Sir *F. Herschell*), and Mr. *J. Horne Payne*,

(1) 2 Str. 1178.
(2) Part 3, s. 3.
(3) Law Rep. 10 C. P. 354.
(4) 12 Cl. & F. 343.
(5) *Contract de Vente*, 289.
(6) 4 Q. B. D. 32.
(7) In the Q. B. at *Montreal*, March, 1876.
(8) 2 C. P. D. 224; 3 C. P. D. 32.
(9) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.

H. L. (E.) 1880

CITY BANK v. BARROW.

were for the Respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, this case has been argued very carefully and very elaborately and with much ability both by Mr. *Cohen* and by Mr. *Vaughan Williams*; and the fullness with which they have argued it has enabled your Lordships to consider it during the progress of the argument, and I believe the result is that none of your Lordships entertains any doubt that the judgment appealed from is right.

My Lords, I find that all the Judges, Mr. Justice *Lindley*, and the Judges of the Court of Appeal, were agreed as to the effect of the clauses which have been called "factors' clauses" in the Canadian Code, to which we have been so frequently referred. I entirely concur in their view of those clauses; and it appears to me that the case really depends upon those clauses, and upon nothing else. I will, however, reserve what I have to say upon those clauses for the present, because the judgment of Mr. Justice *Lindley* proceeded upon a different ground, and that other ground has been perhaps more than anything else the foundation of the argument, at least of Mr. *Vaughan Williams*, at your Lordships' Bar.

If I rightly understand it, Mr. Justice *Lindley* thought that there was difficulty, upon the evidence as to the Canadian Law, (as to which there were three learned witnesses upon one side, and three learned witnesses upon the other), in coming to a satisfactory conclusion; treating that Foreign, or rather Colonial Law, as matter of fact, to be proved by evidence. That being so, he thought the balance was turned by the reference found in the evidence to the case of *Cassils* v. *Crawford* (1), decided by the Court of Queen's Bench in *Canada;* in which, (although the point which arises in this case was not really the ground of the decision,) *dicta* of the Judges were found tending, if correct, to establish this proposition, that under other articles of the Canadian Code, (not being those contained in the factors' clauses,)

(1) In the Q. B. at *Montreal*, March, 1876.

there was a power for a person having possession of goods, in the circumstances in which Mr. *Bonnell* had possession of the leather in this case, to pledge such goods, in a commercial transaction, to a body such as the Appellant Bank.

My Lords, I must own that upon looking at that decision, or rather at those opinions, given by the learned Judges in the case of *Cassils* v. *Crawford* (1), I cannot discover in them, or in the articles of the Canadian Code to which they refer, any sufficient ground for the conclusion arrived at by Mr. Justice *Lindley*. They seem to me to have been opinions, unnecessary for the purpose of the judgment then delivered, not supported by any sound reason or satisfactory authority, and not justified by the articles of the Code to which reference was made. The particular case was this: The clerk of a merchant had stolen some of his master's goods, and had pledged them to a person who was in that case the Plaintiff. In some way they got out of his possesion, and he brought an action for them; and by three to one the Court determined that the thief did not, under any of the articles of the Canadian Code, give a good title to the pledgee. But in the course of those judgments, two of the learned Judges (Mr. Justice *Tessier* and Chief Justice *Dorion*,) expressed opinions to the effect, that under certain very general words in Article 2268 of the Canadian Code a person taking a pledge, from some one dealing commercially with another man's goods without his authority, and without being in any sense his agent, might obtain a good title as pledgee. The other two Judges laid down broadly the principle, that whatever was true of sale under the articles of the Code relative to that subject, ought to be extended also to pledge; that pledge was implied in sale; that the reason in the one case was the same as in the other.

It appears to me, my Lords, that the general doctrine to which I have last referred, and which seems to be independent of anything in the terms of Article 2268 or any other express Article of the Code, is altogether untenable. If there are two things, in fact and in law, which it is easy to distinguish from each other, I should have said that those two things were—sale and pledge. Sales of the kind which are protected by the Article 1489 of this

(1) In the Q. B. at *Montreal*, March, 1876.

H. L. (E.) 1880 CITY BANK v. BARROW. Lord Selborne, L.C.

Code, to which I shall have occasion presently to refer, have circumstances of publicity and occur in the ordinary course of business, which, as one of those learned Judges himself pointed out, is not the case with regard to transactions in the way of pledge, when security is given for money borrowed. It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money.

Not only in the nature of the case are there these differences, but there is no system of jurisprudence which does not recognise them. In this very Canadian Code there is a whole chapter upon the subject of sale. It begins by thus defining a sale: "Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay." And there is another chapter upon the subject of pledge, which begins: "Pledge is a contract by which a thing is placed in the hands of a creditor, or being already in his possession, is retained by him, with the owner's consent, in security for his debt." Each of those subjects is pursued into its details, in a series of clauses carefully and throughout distinguished from each other. Not only is it so in this Canadian Code, but it is generally so in others—certainly in the French Code and in the text-writers upon the French Law, which deal with these two things very much in the way in which they are dealt with in *Canada*. Therefore, to say that where there is power given by law to sell, where a purchaser has by law a good title under circumstances particularly defined, that power extends by implication to a pledge, and that the pledgee will have

a good title also, is an assumption for which neither reason nor authority has been, nor I think can be, alleged.

With regard to the two articles of the Code which were referred to in those judgments, and upon which the argument on this branch of the case was founded, it appears to me that they are of no assistance whatever to the Appellants' case. I will refer to them in the order in which they occur; taking first those which relate to certain sales, and which occur under the head of "Sale." The 1487th Article lays down, subject to certain exceptions, this general rule, which is in conformity with justice and good sense: "The sale of a thing which does not belong to the seller is null." The exceptions are three. The third is immaterial. The first seems to have been new, in the Canadian law, when this Code was made. "The sale is valid if it be a commercial matter, or, if the seller afterwards become owner of the thing." We have nothing here to do with the case of a seller afterwards becoming owner. The words, "The sale is valid if it be a commercial matter," connect themselves with the later article numbered 2268, to which I shall presently refer, and I will reserve any observations upon them until I can take the two together.

The next Article is 1489: "If a thing lost or stolen be bought, in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without re-imbursing to the purchaser the price he has paid for it." My Lords, not only does that article speak of buying and selling and nothing else, but the conditions to which it refers, and which are the ground of that exception being made to the general rule that the sale of a thing which does not belong to the seller is null, are conditions inseparable from a sale and purchase, and inapplicable to the case of a pledge, when money is borrowed. People do not give security, for money borrowed, in a "fair or market or at a public sale." And in my opinion the words "A trader dealing in similar articles" mean a person who carries on the business of a dealer in those articles, that is to say, who sells them, whether in a shop or elsewhere, in the ordinary course of his business. The words naturally refer to a person who sells; and the whole reason, language, and context of the article, relate to sales proper, and not to pledges or deposits on borrowing money.

H. L. (E.)
1880
CITY BANK
v.
BARROW.
Lord Selborne, L.C.

Now, my Lords, I return to Article 1488. That also relates to sale, as indeed does the whole chapter; it is the title of that part of the Code in which these articles are found. It is all about sale. "The sale is valid if it be a commercial matter." That has no reference at all to pledging, and none of these things is referred to under the title "pledge," which, as I have said, is a separate title.

In connection with this I take the other article, on which the chief stress seems to have been laid in this portion of the argument: Article 2268, under the head of "Prescription." That article provides that prescription shall take place, after three years corporeal possession as proprietor; and then it excepts from the necessity of proving prescription, cases in which the law gives a title without it. That is the whole effect of the words upon which so much stress has been laid. "This prescription is not, however, necessary to prevent a thing from being reclaimed by the original owner, if it has been bought in good faith in a fair, or market, or at a public sale, or from a trader dealing in similar articles" (which your Lordships will observe are the words of Article 1489). Then it goes on in words which appear to be new, and which (though I do not think that very material) were not part of the original draft of the Code; "nor in commercial matters generally," saving an exception contained in the next paragraph.

These words, "nor in commercial matters generally," appear to me, my Lords, to have been added in order to mention in this place the subject of Article 1488 in connection with the subject of Article 1489: whatever Article 1488 may mean, that, also, my Lords, I apprehend these interjected words mean; that, and nothing else. And whatever else is clear about Article 1488, this at all events is so, that it relates only to a sale, and does not relate to a pledge.

I do not think that, under these circumstances, it is necessary to endeavour to determine what the apparently wide words, "if it be a commercial matter," may or may not comprehend. My impression is, that those words do not mean to sweep in all sales, in all kinds of commercial dealings, without limit, which probably would have made it unnecessary to provide for many things which are specially provided for elsewhere in the Code—but that they only mean such sales as, either in the ordinary course of com-

mercial business, according to the law merchant, or under any special provisions of the Code as to commercial transactions, (such as the factors' clauses,) would give a good title, as against the true owner, to a *bonâ fide* purchaser.

For these reasons it appears to me that the arguments, which are independent of the factors' clauses, wholly fail. I may add that the argument founded upon the article about prescription, labours under this additional infirmity, that it transforms into a positive enactment of the most wide, sweeping, vague, and general character, that which is no enactment at all, but merely a statement that prescription is not to be necessary in certain classes of cases in which there may be a title without it. But under what circumstances there shall be a title without it, that article manifestly does not determine. You must go elsewhere to answer that question.

I have said so much with regard to these matters because I think, that when they are disposed of, the whole case is disposed of. It was so, not only in the opinion of the learned Judges in the Court of Appeal, but in the opinion of Mr. Justice *Lindley* also. When the question is reduced to one upon what have been called the factors' clauses, it is manifest that their operation under the Canadian Code, in such a case as this, is the same as the operation of the Factors' Acts in *England* in a similar case. They are taken almost entirely from the English Factors' Acts. If you look at the French translation you will find that the word "*facteur*," which is used throughout where you have "agent" in the English, is expressly defined to be "an agent for buying and selling." Independently of that, it seems to me that the general scheme of these articles would lead to the same conclusion. One thing is quite clear, and that is, that an "agent entrusted" means, not somebody else's agent, but the agent of the particular principal entrusted by him as such agent. In this particular case there was no such agent entrusted. It is not alleged that there was an "agent entrusted" with regard to the principal business, out of which the whole transaction arose, namely, the tanning of the leather. That comes under quite a different head—the head of "Lease and Hire" which precedes this head of "Mandate" in the Canadian Code.

H. L. (E.)
1880
CITY BANK
v.
BARROW.
Lord Selborne, L.C.

It is admitted that, as long as the tanning operation was going on, there was no agency at all within the meaning of these factors' clauses. But it is contended, that because the tanner, who had a lien on the goods for his labour, also undertook to procure freights and send the leather home, which he did, taking for his own security bills of lading made out in his name, which he sent to his agents in *Liverpool*, this made him, in that stage of the transaction, after the tanning was done, and when he was sending the goods home under his contract to the owner in *England*, an agent within the meaning of these factors' clauses. My Lords, it appears to me that such a view of the word "agent" would be directly at variance with the authorities, which, as far as I can see, are for this purpose quite as applicable upon the construction of the words in the Canadian Code as upon the construction of the corresponding words in the English Acts. The authorities are thus summed up by Mr. Justice *Willes* in the case of *Heyman* v. *Flewker* (1). He says, after referring to certain cases, "All that these cases decide applicable to the present purpose may be stated thus: that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name."

I apprehend that, although perhaps the words, "possession for carriage, safe custody, or otherwise, as an independent contracting party," may not exactly describe the position of one, who, having been employed to do work upon goods, has also undertaken to find freights and send them home to the owner when the work is done; yet, in substance, the principle expressed in those words does apply to such an employment; and that a person who undertakes an agency of that kind is no more brought within the Act than any of the persons whom Mr. Justice *Willes* mentions. He is not a person "whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name."

But perhaps, my Lords, it is unnecessary to refer to any autho-

(1) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.

rities for that principle, when we find that in this Canadian Code the French translation uses throughout the word "*facteur*" where the word "agent" is used in the English, and expressly defines that word "*facteur*" in a manner which corresponds with Mr. Justice *Willes'* words.

I do not propose to dwell longer upon the case. The *Bankers Act* seems to me to carry it no farther. It is true it refers to the Consolidated Statutes and not to the Code; but the Code is, on this point, only a repetition of the Consolidated Statutes, and is a legislative declaration of the true meaning of those former statutes which are incorporated in it. On the whole, the conclusion which I arrive at is, that the judgment under appeal is right. I therefore move your Lordships that it be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I am of the same opinion. I have listened with great interest to the argument which has been offered to us on the part of both the learned counsel who appeared in support of this appeal. It was a very elaborate and carefully considered argument, and it brought forward, I apprehend, every point which could be of any value in bringing the House to a conclusion in favour of the Appellants. But the difficulties of the Appellants' case were insuperable. The argument could not succeed unless an extension could be given to the Code before us, which would have brought in a remedy in respect of this particular matter as regarded dealings with a factor, which remedy is not to be found in the provisions of the Code, because, as has been well observed by my noble and learned friend who preceded me, there is apparently a distinction carefully kept up in the Code between the case of sale, and the case of pledging, all through, on the one hand; and on the other hand as regards the remedies which are extended apparently by this Act, in conformity with the legislation which took place in this country, and which may have been adopted to a certain extent by *Canada* from the mother country; that remedy does not appear to have been given (at least, not to the full extent) which has been given by some of the English Acts. The construction of the clauses which have been referred to is for the

H. L. (E.) 1880 CITY BANK v. BARROW. Lord Hatherley.

most part plain and clear, namely, Articles 1488 and 1489 and 2268. The last of those articles refers, in one sense, to those former articles, pointing out the particular cases and referring again to those particular cases which have been dealt with by those previous clauses. Sale and pledge are carefully separated; a sale is confirmed in certain events by those clauses, but nothing is said about a pledge.

A great deal of argument was brought to bear upon those clauses, with respect particularly to one doubtful clause, which, in the view I take of the case, does not seem after all to be that which really determines the whole matter, namely, a clause containing words to this effect: the transaction when assailed is protected in matters of commerce, or if the person from whom the purchase is made is a trader dealing in similar articles to the one in question. One easily sees the care and precaution which have been used in framing the Code in that particular, because one of the strong *indicia* of fraud on the part of one person dealing with another, would be that the seller was not a person who, in the ordinary and natural course of his business, sold the article with respect to which the question arose, and as to which it would be impossible for a person coming to purchase from him, to make inquiry, without imposing on the purchaser more trouble than he was bound to take, for the purpose of distinguishing between the articles he was selling on his own account, and those which were intrusted to him. Therefore, in commercial matters, an exception is made in this case. They must be such commercial matters as would take place between a person so situated on the one hand as a purchaser, and a person so situated on the other hand as a seller. It provides for transactions where the seller had goods which were partly his own and partly belonging to other people, which he was minded dishonestly to dispose of, and when the purchaser would approach him as an undistinguishing buyer of goods as to which he would have no reason to suppose that the ownership was different in the one case from what it was in the other.

Now, my Lords, if one could have seen anything in any one part of this voluminous Code which has been produced before us, which dealt in the same manner with a case of pledge, of course that would have been the one important point to discover in the

whole Code; but, from first to last, after the case had been opened so that one was able to obtain a conception of what the precise point of it was, the great difficulty of it appeared to me to be to deal with this in any way as cases of sale are dealt with, when the Code from beginning to end seems carefully to separate these two things and to deal with them in a different fashion. That, my Lords, is really the short point to which the whole case is reduced. In trying to overcome the difficulties which present themselves, Mr. *Vaughan Williams* has been compelled to proceed into an analysis, but in the total result there has not been found any clause, as it appears to me, in which protection is thrown around a pledge obtained under the circumstances under which this pledge was given in the transaction we have before us. I concur in the judgment now proposed.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

If this had been an English case, I mean a case to be governed entirely by English Law, I should have thought it necessary to say no more than that it is decided by the case of *Cole* v. *The North-Western Bank* (1), which I have not the slightest reason to suppose to be impeachable in any way whatever. But in point of fact it is not to be decided according to English Law, because the pledge upon which the Defendants claim was made in *Canada* in respect of goods then in *Canada*. I take it therefore that there is no doubt that the validity of the pledge depends upon the Canadian Law, and we have to see what the Canadian Law is.

First of all, my Lords, I may observe that I quite assent to what has been said, and for which the passage in *Bell's* Principles (2) was cited, that the rule not merely of English Common Law, but I take it of Roman Civil Law, and I apprehend of all the old laws of *Europe*, by which I mean the laws existing before the *Code Napoléon*, that no man could confer a greater title than he himself had, has been found in modern practice to be inconvenient to its full extent in commercial transactions, especially since

(1) Law Rep. 9 C. P. 470; 10 C. P. 354.
(2) Part 3, s. 3.

H. L. (E.) 1880 CITY BANK v. BARROW. Lord Blackburn.

the practice of advancing money upon the security of goods and merchandise came to be so important as it is; and I quite agree that there have therefore been modifications of that principle introduced into the law of this country and into the law of *Canada*, and I dare say into the laws of other countries.

Those modifications were introduced in *England* and in *Scotland* too by the Factors Acts, which define and regulate, and shew to what extent the modifications are given; they at once modify the law and shew how far it is to be modified. It is sufficient to say, briefly, that the decision in *Cole* v. *The North-Western Bank* (1) comes to this: that an agent who can pledge or sell must be an agent of that class which, like factors (taking almost the words of Mr. Justice *Willes* in the case which has already been referred to of *Heyman* v. *Flewker* (2)) have a business, which, when carried to its legitimate result, would properly end in selling or in receiving payment for goods. That would be a kind of class; factors and agents, in the class of factors. If such a person is "entrusted" and is entrusted in that capacity, then, in the absence of bad faith on the part of the pledgee, the pledge is good. If it is not, you must fall back on some other principle to make it good in law.

Now, how is it in *Canada?* In the first place, before I go farther, I will observe that there is not in all the mass of evidence which has been put together here, a suggestion that the old law of *France* contained any such provision as that all sales in matters of commerce were to be good whether the man had authority to make them or not. It did contain this provision, that the rule which says that you could not confer a better title than your own, was subject to these exceptions; if it was a sale in public market—market *ouvert*, or if the article was purchased at a public sale, or if it was purchased, according to what I understand the old French Law to have been, in a shop, if it was purchased from a *marchand*, that is to say, not a merchant in our sense, but a shopkeeper dealing in articles of that sort. That is an extension of the law of market *ouvert*, but I may observe not an extension going much beyond (not the ordinary English common law but)

(1) Law Rep. 9 C. P. 470; 10 C. P. 354.

(2) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.

the custom of *London*, according to which every shop in *London* is a market *ouvert*, and therefore so far as the City of *London* goes, that which I understand to have been the old French law would not be more extensive than our English law.

But the Code here has altered that, and the Code here when introducing that exception makes it not merely, in public market, at a public sale, or from a shopkeeper, but it specially says from a "trader," it changes the word *marchand* into *commerçant*. I have no doubt whatever that the effect is that in *Canada*, by the Code, they have extended the principle into saying that a purchase from a merchant, in our modern sense, dealing with these articles may be good enough. But that is but a part of the principle of market *ouvert*. Now this case cannot be brought in any sense whatever within the word "purchase."

Now, my Lords, we have to see what is the effect of the change in the Canadian law brought about by the Factors Acts. Those Acts were embodied in the Canadian law, or rather were transferred to *Canada* almost in their terms, and quite in their meaning. The Canadian lawyers who gave evidence in this case tell us, and I should have expected that it would be so even if I had not been told so by them, that in construing the effect of the Canadian law when taken from the English, they look to English decisions, and say the English law is to be understood, and is meant by these Acts to be carried over, bodily, to *Canada*, and consequently *Cole* v. *North Western Bank* (1) is a good authority in *Canada* upon the construction of the Canadian Acts. I should certainly have expected it to be so, and they say it is so.

But then the argument which is here used is that there are some things in the Canadian Code which give a different effect to it, and one must see what they are. First of all, there is the section which has been repeatedly mentioned, sect. 2268, which begins by saying that where you have got actual possession, three years shall give you a prescription. Now that section might very well have stopped there, but they thought it as well to go on and say what I should have thought would have been implied, namely, prescription is not necessary to give a man a title when the circumstances under which he has acquired possession are such as to

(1) Law Rep. 9 C. P. 470; 10 C. P. 354.

H. L. (E.) 1880 CITY BANK v. BARROW. Lord Blackburn.

give him a title without. If he has a title at once, he need not wait for three years. And then they did refer to the old French law with the alteration which has been before pointed out. "This prescription is not, however, necessary to prevent reclaimer, if the thing had been bought in good faith in a fair or market, or at a public sale, or from a trader trading in similar articles." I must observe that, as I said before, a "trader" is here put in, that is to say, a "*commerçant*" instead of a "*marchand*;" and, if I am right in my notion of what the old French law meant, it does considerably extend it. "Nor in commercial matters generally." What does that mean? I take it that it means that where, according to the commercial law, either as it existed in *Canada* before, or as it has been made by the Civil Code, and the subsequent enactments which have been brought in, a title has been acquired, you do not need to wait for three years. What occurs to one upon that at the first blush of the matter is, that where it is a negotiable security, such as a promissory note or a bill of exchange, or the like, you certainly do not need prescription to give you a right to that, and there would be other cases which would be included. Whatever is included within the Factors' Acts I think would be "commercial matters," and would come in; and whatever has been sold or pledged in such a way that the sale or pledge would be good under the Factors' Acts, is understood in *Canada* to be brought in there. In these cases you do not want your prescription, because you have your right at once. That is the sense to be put upon those words "nor in commercial matters generally." It could not be for a moment contended that they meant that wherever anybody had got hold of, had corporeal possession of, goods in a commercial transaction, he should instantly have as good title to them as if he had kept them for three years. That would be quite an impossibility. The law could not have meant that. I think it may be limited in the way I have explained.

Now let us turn back to the other clause which has been so much relied on with regard to sale. The general rule as laid down is perfectly right, "that the sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles." Of these three following articles we have nothing to do with the third. The second

article, No. 1489, is that upon which I have already dwelt—it contains the exception of an article "bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles," in which case, even though it be stolen, it cannot be reclaimed without tendering the price which was actually paid. But then Article 1488, which is the section upon which reliance is mostly placed, is this, "The sale is valid if it be a commercial matter." That, to my mind, does plainly mean to say that a sale is valid if it be a "commercial matter," and the transaction is such that the sale is according to the law merchant or according to the other provisions of this Code, or probably according to the general French law existing in *Canada* at the time. If it would be good according to that law, then it shall be valid. Still it does not say the contrary. I have already said, and this is the principal reason why I call attention to it, that there is no ground given in the course of this case, that I can see, for supposing that in the Canadian law, antecedent to the introduction of this Civil Code, there was any law which would have made a sale under circumstances like the present, that is to say, a sale by a tanner who had got possession of his customer's leather, and was requested by that customer to send home the goods he had been tanning by sea to him. There was no law in *Canada* that would have made that good in the way even of a sale, and still less of a pledge.

Then I think, in order to put sense upon that article, we are are driven to look at other parts of the Code and see what light they throw upon it. Now, in the chapter upon Mandate, chapter 5, "of brokers, factors, and other commercial agents," we have cases which make very good sense of this. Article 1739 commences by saying that "anyone may safely purchase from an agent who is entrusted with the possession of goods," and an agent entrusted with goods may pledge them. Then it says that an agent entrusted with goods has power to do a variety of things, and there are several similar provisions all worded "an agent entrusted with the possession of goods;" and pointing to sale and pledge, which would be in this matter (which would be a commercial matter) made valid in the eye of the law. That seems to me completely to satisfy the meaning of Article 1488.

Now, my Lords, there remains only a word or two to be said

H. L. (E.)
1880
CITY BANK v. BARROW.
Lord Blackburn.

upon the rest of the case. The judgment in the Canadian case of *Cassils* v. *Crawford* (1), which was so much relied upon, has not the same effect as a decision here. Decisions of the Courts in *Canada* have not the same effect as we are in the habit of giving to decisions in our Courts here. It is explained in the course of the evidence that a judgment in *Canada* is a matter which the Courts afterwards may consider as much as they like, but it has no binding authority at all. And when I look at the reasons given for the judgment in *Cassils* v. *Crawford* I cannot agree with them in the least. It appears to me that some of those Judges irrelevantly (for it was not the point before them) assuming—which I have already pointed out is not my opinion—that this would be a good sale because it would be a matter of commerce, they say it follows necessarily that a pledge would be so too, for pledges must be so, wherever sales would be so. The first of the Judges, who seems to be the only one whose decision was overruled, has very fairly and well stated the objection to that; he said that a purchase from a trader might very well be held to be good inasmuch as it is fairly and openly done, yet a pledge by a trader was a matter in which there was not the same degree of openness according to practice, and which was not so much considered. He states that as a very powerful argument against him, but he does not answer the reasoning but overrules it. That being so, I certainly pressed Mr. *Vaughan Williams* several times for an answer to that reasoning, and he was obliged at last to own that he could not supply any. I do not blame him at all—there is none to supply—the argument was unanswerable. There was no right to require Mr. *Vaughan Williams* to do that. I do not think anything in the slightest degree could be said upon that point.

As to the other suggestions which follow from it, taking the Canadian law of factors to be the same as our own, to suggest that a man who shipped goods, as *Bonnell* did here, could in any sense be said to be an agent for the sale of the goods, seems to me impossible; and I could not comprehend or see any ground for the other suggestions which were made. Consequently, I perfectly agree in the conclusion which has been come to by the noble and learned Lord on the woolsack and the noble and learned Lord opposite.

(1) In the Q. B. at *Montreal*, March, 1876.

LORD WATSON:—

My Lords, I have no hesitation whatever in agreeing with your Lordships upon all the points of this case which have been so largely discussed at the Bar. It does not appear to me that with reference to the terms of the Canadian Code, or of those laws which introduce the Factors Acts into *Canada*, there can, upon the construction of them taken by themselves, be any doubt whatever that Mr. *Bonnell* was not an agent of the Plaintiffs (the Respondents) in this case within the meaning of the Code and of those statutes. I quite agree in the observation which has been made by your Lordships, that the decisions of the English Courts may be fairly looked to as authorities in construing those enactments, and, when thus regarded, I think they leave no doubt whatever upon the point, if indeed a doubt would have existed apart from them.

But a great deal has been made of a general clause of the nature of an exception introduced into the 2268th Article of the Code. My Lords, it is a somewhat singular circumstance that in the evidence of those gentlemen learned in the law of *Canada*, who were examined as experts, there is only to be found one reference to this question, which has been so largely argued here. All the three experts, witnesses on behalf of the Appellant, put his case entirely upon that title 8, chapter 5 of the Code, which deals with the case of the powers of brokers, factors, and other commercial agents. Only one of them, Mr. *Kerr*, refers to sect. 2268, and, as was pointed out by Lord Justice *Cotton* in his opinion in the Court below, he only refers to it incidentally, and does not rely upon it as a ground for sustaining the Appellant's case. My Lords, I think it quite out of the question to endeavour to put such a construction upon that clause as has been put upon it by two of the Judges of the Canadian Court of Queen's Bench, in the case of *Cassils* v. *Crawford* (1). I do not think those Judges were unanimous in the view which they took of it, for whilst two of their number, including Chief Justice *Dorion*, seemed to regard it as a separate and substantive enactment upon the subjects of sale and of pledge (which are fully dealt with in other parts of the Code) two regard it (one of them was Mr. Justice *Ramsay*) as

(1) In the Q. B. at *Montreal*, March, 1876.

H. L. (E.) 1880 CITY BANK v. BARROW. Lord Watson.

a defect in the formation of Article 2268, and another, Mr. Justice *Sanborn*, regards it as cumulative and reiterative. In that observation I rather agree with the learned Justice, if he meant to suggest that it referred back to a previous part of the Code, not creating in itself an exception, but referring to those exceptions which had already been created.

My Lords, it seems to me to be very plain that there was no intention in introducing that sentence to create exceptions, but merely to refer to the fact that exceptions did exist. It was not intended to make a new law of sale, or a new law of pledge, or to alter the law already made. I think it was simply intended to state that prescription was not necessary, either in the enmunerated cases or in any other case where the possessor of a corporeal moveable had already got a good title according to commercial law, leaving it to the law to determine whether that good title existed or not. But, my Lords, the grounds upon which I have arrived at that opinion have been so thoroughly explained by the noble and learned Lord on the woolsack, that I merely indicate my entire concurrence, not only with the result, but with all the observations which have fallen from your Lordships.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, June 25th, 1880.

Solicitors for Appellant: *Ingle, Cooper, & Holmes.*
Solicitor for Respondent: *H. Montagu.*

[HOUSE OF LORDS.]

JOHN WALLINGFORD . . . . . APPELLANT;

AND

THE DIRECTORS, &c., OF THE MUTUAL SOCIETY, AND THE OFFICIAL LIQUIDATOR THEREOF . . . . . RESPONDENTS.

H. L. (E.)
1880
June 3, 4, 7, 8.

Judicature Act, Rules and Orders—Lottery—Penalty—Mortgage—Accounts.

In a question arising on Orders and Rules made under the Judicature Acts in matters where Courts or Judges are to exercise a discretion, the House is unwilling to disturb the orders made, unless for strong substantial reasons; but the principle on which such orders ought to be made, may furnish those reasons.

By one of the General Orders of the *Judicature Act*, 1875, eight days only are given for an appeal to the Divisional Court against an order made by a Judge at Chambers:—

Held, that that limitation of time does not affect the right to appeal against an order made in vacation at Chambers, when no Divisional Court would be sitting within the eight days. The time for appealing against such an order, ought, almost as a matter of course, to be enlarged.

Where an order had been made at Chambers and the eight days had, under such circumstances, expired without an appeal to the Divisional Court, the fact that an execution had in the meantime issued, makes no difference in the matter.

Where, in a claim for payment of sums of money, the defence set up is that of a denial and contradiction of the accounts on which the claim is founded, it is erroneous to make an order under Order XIV., rule 1a, refusing to a defendant the liberty to defend, except upon the condition that he must pay into Court a definite sum of money within a certain time, and that, unless he does so, judgment shall be signed against him. And this is especially the case where there are mortgages, and the creditor has been a mortgagee in possession.

An order at Chambers was made refusing leave to defend, except on terms, the time for performing which was allowed by the Defendant to expire, and another order at Chambers was afterwards made refusing leave to enlarge the time within which the first order might be contested. An appeal was then taken to the Divisional Court against the second order, when that Court desired that the notice of motion should be considered as amended so as to include the first order:—

Held, that the two orders were thus brought fully before the Court, and the judgment then given must be taken as applicable to both of them.

For the same reason, in an appeal against that judgment, the Court of

H. L. (E.)

1880

WALLINGFORD v. MUTUAL SOCIETY.

Appeal must be considered to have had both the orders brought under its revision, and on an appeal to this House both the orders and both the judgments were brought into discussion.

In a mortgage bond, given to secure the due payment, by instalments, of a sum due, a provision making the total sum due enforceable on any default, is not to be considered a penalty.

A society constituted (avowedly) for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts.

A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any Court ought to take notice.

Therefore, an account directed to be taken in this case, where such an allegation had been made, was directed to be taken without regard to this insufficient allegation of fraud.

The judgment and execution were ordered to stand as security.

General directions as to the mode of taking the account.

APPEAL against a decision of the Court of Appeal in a matter relating to orders under the *Judicature Act*, 1875.

On the 20th of September, 1868, the *Mutual Society* was registered as an unlimited company under the *Companies Acts* of 1862, 1867. The declared object of the society was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation, to secure payment of such advances by taking over and holding real or other securities—and ultimately to divide among the members all the profits that had been made. The directors had powers to do all things necessary to accomplish these purposes. The Appellant (who was originally the Defendant in the action), was a member of the society, and for some years acted as its agent. The mode of operation appeared to be this: To obtain subscriptions from members, to advance them money, on interest, upon "certificates of appropriation." The 9th "article of association" declared that "an appropriation certificate shall be a document issued to every such member on his entering the society, and shall certify his title to receive an advance out of the funds of the society, as well as to participate in the profits pursuant to the conditions and regulations hereinafter contained." Any member might nominate a life upon which a certificate was to held, and the members holding these life certificates were to be entitled to tontine bonusses. An

"appropriation," or advance was to be made (Art. 22 B.) "according to the number of certificates held by the member successful in obtaining the appropriation." By Art. 27 it was declared that "appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively." All appropriations were to be repaid by equal quarterly payments extending over twenty years from the advance. The Appellant took up appropriation certificates and obtained advances. The directors complained that he did not, regularly, make the required payments. He gave them certain securities, and, among others, on real property, called "mortgage bonds." On the 3rd of August, 1878, an action was commenced against him for a considerable sum of money alleged to be the accumulation of loans, interest, and subscriptions. The action was by writ, which was specially indorsed with the particulars of the amount claimed (£12,703 10s.) pursuant to the provisions of Order III., rule 6, of the *Judicature Act*, 1875. The Appellant entered an appearance to the writ, after which, under Order XIV., rule 1a, the Respondents took out a summons for leave to sign judgment on an affidavit that there was "no defence" to the action (1).

The Appellant alleged generally that he had by fraud and misrepresentation been induced to enter the society, but did not give particular instances of the alleged fraud. This charge he afterwards withdrew. He also alleged disputed accounts and counterclaims, and insisted that he had a good defence to the action.

This summons was heard before Master *Francis* (one of the

(1) Order XIV., rule 1a :—"When the Defendant appears to a writ of summons specially indorsed under Order III., rule 6, the Plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the Defendant to shew cause before the Court or a Judge why the Plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the Defendant by affidavit or otherwise satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the Plaintiff to sign judgment accordingly."

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY.

Masters of the Common Pleas Division) who, in the result, made an order that, on payment by the Appellant into Court, within ten days, of £11,703 10*s.*, or giving security to that amount, the Appellant should have leave to defend the action. The Appellant took out a summons before Mr. Justice *Manisty*, at Chambers, for a dismissal of this order, and Mr. Justice *Manisty* varied it by reducing the sum to £5000 payable into Court within one month. By Order LIV. rule 6, "Every appeal to the Court from any decision at Chambers, shall be by motion, and shall be made within eight days from the decision appealed against." By Order LVII., rule 6, the time may be enlarged by a Court or Judge, and such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. Nothing was done by the Appellant as to the order of Mr. Justice *Manisty* within one month. Judgment was signed, and on the 10th of October, 1878, the costs were taxed. On the 24th of October, 1878, a *fi. fa.* was issued to the sheriff of *Hampshire* to levy £7091 14*s.* 5*d.*, that being the balance then claimed as due, after giving credit for the securities in the possession of the society. Execution was levied. On the 26th of October the Appellant took out a summons for time to appeal to the Divisional Court against the order of Mr. Justice *Manisty*. This was supported by an affidavit of the clerk to the Appellant's solicitors stating that the motion required by Order LIV., rule 6, had not been made as it was Vacation and no Divisional Court was sitting. There was an affidavit on the other side stating all the circumstances of the case. The summons was heard before Mr. Justice *Field*, who dismissed it with costs. On the 2nd of November a motion was made in the Common Pleas Division to review the decision of Mr. Justice *Manisty* on the ground that a good defence on the merits had been shewn by the affidavits before him. It was also treated as an appeal against the order of Mr. Justice *Field* refusing the extension of time. The Common Pleas Divisional Court dismissed the summons. The case was taken to the Court of Appeal. A preliminary objection was then taken on the ground that the Common Pleas Division had not purported, nor had power, to deal with the order of Mr. Justice *Manisty*, and that therefore the appeal could not be supported. The Appeal Court dismissed the

appeal with costs. This appeal was then brought to this House. The irregularity of these various judicial orders was insisted on, and it was urged that in a case, like this, of complicated accounts, it was impossible to say there was no defence. It was also urged that the constitution of the society itself was illegal, as its promised benefits were to be given to the members by drawings, which made the society illegal under the Lottery Acts, whereby the Respondents were rendered incapable of suing the Appellant under his covenants, and also that the right to enforce payment of all that was due, on default being made as to any part, was in law a penalty and therefore could not be enforced.

In May, 1879, the Appellant commenced an action against the Respondent in Chancery for an account, and prayed that, on payment of what might be found to be justly due, he might be allowed to redeem his securities.

On the 8th of November, 1879, an order was made for winding up the society. The proceedings in the action in Chancery were suspended.

Mr. *Wills*, Q.C., Mr. *Edward Hadley*, Mr. *Thrupp*, and Mr. *J. Bradley Dyne*, appeared for the Appellant:—

Crom v. *Samuels* (1); *Fox* v. *Wallis* (2); *Burke* v. *Rooney* (3); *Gibbons* v. *The London Financial Association* (4); *Bell* v. *The North Staffordshire Railway Company* (5); *Runtz* v. *Sheffield* (6); *Stirling* v. *Du Barry* (7), on the subject of the Orders and Rules, were cited and commented on; and *Ex parte Alston, In re Holland* (8), was referred to on the subject of the claim to have an account taken and the securities marshalled. *Fisher* v. *Bridges* (9) and *Henderson* v. *Lacon* (10) were also cited; and the Lottery Acts.

Mr. *Joseph Brown*, Q.C., and Mr. *Reginald Brown*, were for the Respondents:—

Bonafous v. *Rybot* (11), *Gowlett* v. *Hanforth* (12), *James* v.

(1) 2 C. P. D. 21.
(2) Ibid. 45.
(3) 4 C. P. D. 226.
(4) Ibid. 263.
(5) 4 Q. B. D. 205.
(6) 4 Ex. D. 150.
(7) 5 Q. B. D. 65.
(8) Law Rep. 4 Ch. App. 168.
(9) 3 El. & Bl. 642.
(10) Law Rep. 5 Eq. 249.
(11) 3 Burr. 1370.
(12) 2 W. Bl. 958.

H. L. (E.) 1880

WALLINGFORD v. MUTUAL SOCIETY.

Thomas (1), and *Thompson* v. *Hudson* (2), were cited to shew that enforcement of the payment of all that was due when one default was made was not a penalty. *Matterson* v. *Elderfield* (3), to explain the rights of a member of a society of this kind, on accounts being taken, and *Smeeton* v. *Collier* (4) in support of the power of a Judge at Chambers to make an order, with reference to the delivery up of a mortgage deed.

At the close of the argument the Lord Chancellor read a sketch of the order which the House proposed to make in this case. Some verbal alterations were afterwards made, and the order finally stood as now printed at the end of their Lordships' judgments.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, this is a very unfortunate case, the appeal to your Lordships being the fourth proceeding which has taken place by way of appeal or rehearing from an order made by Master *Francis* in Chambers on the 27th of August, 1878, without reckoning the application for time to Mr. Justice *Field*. The order of Mr. Justice *Manisty* maintaining that of Master *Francis*, with the reduction only of the amount which the Master had ordered to be paid into Court, was affirmed by a Divisional Court; and also, although not on the merits, by the Court of Appeal. The question being in some sense one of discretion under the 14th General Order governing the practice of the High Court, your Lordships would be very unwilling to disturb those orders, unless for strong and substantial reasons. But the question which arises in this case, as to the principles on which the 14th General Order ought to be applied, seems to me to be one of great importance to the proper administration of justice; and the House is relieved from the difficulty of overruling two concurrent judgments of the Divisional Court and the Court of Appeal, on the merits of the case, by the fact, that the Judges, from whose decision the present appeal comes to this House, were unanimously of opinion that the order of Mr. Justice *Manisty* ought not to have been made;

(1) 5 B. & Ad. 40.
(2) Law Rep. 4 H. L. 1.
(3) Law Rep. 4 Ch. App. 207.
(4) 1 Ex. 457.

although they thought themselves, for reasons with which I am unable to agree, precluded from giving effect to their own view of the original merits of the case.

Upon the question of time, on which the judgment of the Court of Appeal was really founded, I, for my own part, feel no difficulty. It stands thus—By the General Orders eight days are given to appeal from an order of the description of that which was made by Mr. Justice *Manisty*, to a Divisional Court. That order was made in the Long Vacation; and it was not possible that there should be any appeal to a Divisional Court until the 2nd of November, long after the lapse of the eight days. To act, therefore, upon the General Order as to the limit of time for appealing, was impossible. Under those circumstances, it appears to me, that it ought to have been considered very nearly, if not quite, of course, that the time for appealing, which had expired before a Divisional Court could possibly be assembled, should, upon a proper application, be enlarged.

I do not mean to say, that a party might not have so conducted himself, in the interval, as to create a personal estoppel against him when applying for such an enlargement of time. But I am of opinion that the interval which actually elapsed between the date of Mr. Justice *Manisty's* order made on the 6th of September 1878, and the application made to Mr. Justice *Field* late in October, was not in itself a sufficient reason why the time should not have been enlarged. No Divisional Court had sat, or could possibly have sat, during that interval. It was the Long Vacation; and in the Long Vacation we all know that professional gentlemen, as well as others, are not expected to press forward all business in the manner which at other times may be necessary. It does not appear to me that any conduct is shewn or even suggested to have taken place on the Appellant's part in the interval, which as between himself and the Respondents should be a reason for refusing, under these circumstances, to grant the enlargement of time. It is true, that an execution had been issued; and, in doing justice between these parties, the fact that nothing had been done (perhaps nothing could have been done), to stop that execution, must be taken into account in the order to be made; and we must deal with the execution as well as we can.

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Selborne, L.C.

But I fail to see that, from the mere fact of that execution having been issued, any prejudice need, or will, arise to the Respondents, if we treat the time, as I think your Lordships ought to treat it now, as having been enlarged.

Taking that view, the ground upon which the Court of Appeal declined to grant a remedy to the Appellant is displaced, and I think that the question must now be treated by your Lordships, and ought to have been treated by the Court of Appeal, as completely open; because it is admitted, in the printed case of the Respondents themselves, that what took place at the hearing before the Divisional Court was this. It was competent at that time for the Appellant to have appealed, by motion in the regular form, from the order of Mr. Justice *Field* refusing to extend the time. The Appellant had not, in point of form, done so; he had, in point of form, appealed from Mr. Justice *Manisty's* order only: and to that appeal it was an objection (which, if insisted upon, would only have caused expense and delay), that his time for appealing was past. In that state of things, upon the objection being taken before the Divisional Court, that Court suggested that, to prevent unnecessary delay and circuity, because the slip was not an irremediable one, the Respondents should consent to treat the notice of motion then before the Divisional Court as being amended, so as to be an appeal from the order of Mr. Justice *Field*.

Now even assuming, as I think your Lordships are bound to assume, after what has been stated regarding the impression upon the mind of the Respondents' junior counsel, that the effect of this was not understood by him at the time exactly as I think your Lordships ought to understand it, still, beyond all dispute, the question of time was open and was brought before the Divisional Court by reason of that consent. Being open before the Divisional Court by reason of that consent, it was also, in my judgment, open before the Court of Appeal, when the appeal was brought from the order made under those circumstances, and it is also, for the same reason, now open before your Lordships. I cannot agree that it is consistent with any reasonable interpretation of such a consent to read it as if it meant, that the appeal motion from Mr. Justice *Manisty's* order was abandoned, or was to be postponed until some later date after a new notice should have

been given, and that the only question before the Divisional Court had come to be the question of time. In my view the effect of it was, that both questions were, by means of that consent, before the Divisional Court; and the Divisional Court did deal with the question upon the merits; and, in my judgment, the Court of Appeal ought to have dealt both with the question of time, and with the question upon the merits.

Well, my Lords, that brings us to the question upon the merits of the case; and the first point, upon which I wish to make a few observations, is that which alone is of really great public importance; namely, the principle upon which Order XIV. ought to be applied. It is a very valuable and important part of the new procedure introduced under the *Judicature Act*, that the means should exist of coming by a short road to a final judgment, when there is no real *bonâ fide* defence to an action. But it is of at least equal importance, that parties should not in any such way, by a summary proceeding in Chambers, be shut out from their defence, when they ought to be admitted to defend. And I cannot but think that the facts of this case shew, (though I have not the least doubt that the Respondents' advisers acted in perfect good faith,) that they made an application for a summary judgment under the 14th Order, in a case in which such an application was not proper, and ought not to have been made.

The writ which they issued was indorsed with particulars shewing a claim to a total balance of debt, as then due, of £12,703 10*s.* upon certain mortgage bonds; the affidavit made in Chambers, in support of the application for liberty to sign judgment at once, gave credit, against this, for a sum therein-mentioned; and the judgment which they obtained leave to sign was for £11,703 10*s.*, subject to a condition, that, if that money was paid into Court or security given to the satisfaction of the Master, the present Appellant might be let in to defend.

My Lords, it appears to me that, even upon the face of the mortgage bonds, there were strong reasons against summarily assuming, without going into an account between the parties, that any such sum was due. Affidavits were made by the Appellant, contesting, upon grounds to which I will presently advert, the whole debt; and in addition denying, in general terms, that any-

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Selborne, L.C.

thing was due, and also mentioning certain particular sums or items for which the Appellant claimed to have credit, if an account were taken; which account, he said in those affidavits, it was necessary to take; and he added, generally, that there were various questions of account between the parties. Looking at the mortgage deeds and at the affidavits, it appears to me, that the Judge before whom the application in Chambers was made ought to have held, that on those materials the case was not a proper one for summarily giving judgment for the amount claimed in the action. Nor do I think that, upon those materials, it was possible for him to say, a line is drawn between a certain part of the demand, as to which a defence ought to be allowed, and another part as to which a defence ought not to be allowed, so as to make it right to let judgment be signed for a certain sum, less than the whole demanded, but a defined part of it. When the case was so stated, even upon those first affidavits, the true conclusion (in my judgment) was, that there was an account to be taken as between a mortgagor, debtor, and creditors who were mortgagees in possession of certain securities, some of which were alleged to have been partly realized, and as to which nothing but an account could shew what the mortgagees ought to give credit for, and what they ought not to give credit for. Therefore, so far as the account was concerned, it would have been right and proper to let in the Appellant to defend. I take so strong a view of the case in that light, that I think it ought to have been considered very nearly a matter of course, under these circumstances, to let the Appellant in to defend, for the purpose of taking that account.

The next question is, upon what terms? The terms imposed were, either to pay into Court, or to give satisfactory security for, the whole amount in the opinion of the Master, but in the opinion of Mr. Justice *Manisty* £5000, being somewhat less than half the amount required by the order of the Master.

We are told at the Bar that Mr. Justice *Manisty* reduced the amount upon some kind of estimate, not founded, so far as I can see, upon any affidavit that was before him, as to what might possibly be the value of the securities realized or unrealized. I think that was an unsatisfactory mode of dealing with a case of this nature. I cannot think that either to order payment into

Court, or to require farther security, was, *primâ facie* at all events, a proper or a reasonable condition on which to allow a party the ordinary right of defending to the extent of ascertaining what was justly due from him, when you bear these two things in mind; in the first place, that if he should be unable to pay this considerable sum of money, or to give this farther security to the satisfaction of the Master, he would be totally shut out, according to the order which was made, even from the opportunity of reducing that large total amount; and, secondly, that the case was one of security from the beginning—a case in which the Respondents had taken the security upon which they were originally satisfied to enter into the transaction, consisting partly of certain real estate and partly of certain Spanish bonds, and also of the interest of the Appellants in their own and another company called the *Trust Fund Company*, represented by certain certificates and other rights, which in truth represented the whole value of the loan for which the security was given. Nothing in the shape of money found its way into the debtor's hand. The whole transaction had for its object the creation of those interests in the Respondents' society and in the *Trust Fund Company*, all which, whatever their value might be, were included in the mortgage, together with farther real and other securities.

In a case of that kind, between mortgagor and mortgagee, it does appear to me that very special reasons indeed were necessary to justify an order imposing, as a condition upon what is *primâ facie* every subject's right, (the being let in to defend,) the obligation either to pay a large sum of money into Court, or to give farther security.

For those reasons I think that the order of Mr. Justice *Manisty* was wrong; and that the true course would have been to do what was formerly done by the Court of Chancery in most cases, when an application was made to stay an action at Law in order that an account should be taken in Equity; namely, to allow judgment to be signed, for the sole purpose of standing as an additional security for any amount which might be found due on taking the account, without power to issue execution otherwise than by leave of the Court; and that this should have been done on the terms of the plaintiffs consenting to an account being at once taken; and, in

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Selborne, L.C.

substance, that is the order which I should advise your Lordships now to make for the purpose of doing justice between the parties in this case.

My Lords, it may be right, since that has been fully argued, to express an opinion upon the point, whether the Appellant has shewn, that in this case the mortgage bond ought to be regarded as making the total sum mentioned payable merely by way of penalty, to secure the regular payment of the instalments; so that the debt ought to be regarded as still payable by those instalments only, even after default had been made in the payment of a particular instalment. Your Lordships will not, I believe, think it necessary to make any declaration upon the face of the order on that point; but, for my own part, I feel bound to say that the Appellant has not succeeded in satisfying my mind, that it would be right for the House to declare that the account is to be taken on any such footing. The real matter seems to stand thus. These mortgage bonds were given to secure the £6000, which sum was treated as advanced, although money did not pass, and also the premiums, which would become due by instalments according to the rules of the society; and the payment of which under those rules was liable to be accelerated, if any of the instalments were not punctually paid. I cannot think that such an acceleration of payments has anything in common with a penalty. It was a contract for certain payments which were *debita in præsenti* although *solvenda in futuro;* and, being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments which were originally deferred. I think, therefore, that it would not be right for your Lordships in your order to give effect to that contention on the part of the Appellant; but that the account must go at large upon the securities as they stand.

There were two other contentions, going to the whole demand; one, that this was a transaction within the Lottery Acts, and the other that it was a fraud.

With regard to the Lottery Acts, the learned junior counsel for the Appellant referred your Lordships to the terms of the

Acts on which he principally relied. One of those Acts plainly, on the face of its recitals, (the enacting part not departing from those recitals,) had reference to gambling transactions only; and in my judgment this was not a gambling transaction, within the meaning of that Act. The other had reference to persons who kept lottery offices, at which the public were invited to pay for lottery tickets; and that Act could have no application to this case. No case therefore, in my judgment, was made, worthy of a moment's consideration, in support of the contention that these were illegal transactions under the Lottery Acts.

11 QBD 210

With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case.

I am not sure that it is necessary to say anything more. The parties have been informed of the form and nature of the order which your Lordships think it would be right to make for the purpose of doing justice in this case; and, subject to the questions, which your Lordships will have decided, whether any relief at all should be given to the Appellant, and whether an account should be directed or not, they have agreed to certain terms, which I think are perfectly reasonable; according to which, in the account to be directed, credit is to be given for a certain sum as the value of the real security not yet realized; and the Respondents are to pay into Court the sum which they levied under the execution, namely £1300.

With respect to the execution, a few words seem to be necessary. Upon the principle of your Lordships' judgment, if you should agree with what I have said, there ought to have been no execution issued at all, because there ought not to have been a judgment upon which execution could have been issued,

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Selborne, L.C.

without the leave of the Court after an account taken. But the thing having been actually done, and having become one of the inextricable elements of the case with which your Lordships have to deal, it does not appear to me, and I think it will not appear to your Lordships, to be necessary for the purposes of justice, that that execution should be treated as if it had never taken place. For some purposes it cannot be so treated, because the £1300 must be paid into Court; and I may also perhaps mention that I have myself been considerably impressed with the sum indorsed for the levy upon the writ of execution as evidence that the original order ought not to have been made; because, according to the general orders of the Court which regulate executions, the sum actually due ought to be indorsed for levy upon the writ; and in one of the affidavits in this case, language is used which seems to me to signify that the indorsement really represented not some voluntary retrocession of the Respondents from the extent of their full right, but their own view of what was actually due to them, at the time when the judgment was signed for a much larger amount.

In that state of circumstances the execution itself has been an element tending, at least in my view, to assist the Appellant's case; and it appears to me that full justice will be done if the execution, now that it has been actually issued, as well as the judgment, should stand as security for what may be found due upon the footing of the account that is to be taken.

My Lords I apprehend that being thus, by the order of your Lordships' House, treated as a mere security between these parties, no other Court will act upon that execution for any purpose which might affect the interests of the parties. It will be regarded merely in the same light in which a judgment would formerly have been regarded, when entered up by order of a Court of Equity by way of security, until it becomes, (if it should ever become,) an effective execution upon which a farther levy may be made. It cannot in the meantime operate (as I apprehend) anywhere to the Appellant's prejudice.

I think it is unnecessary to say more except to move your Lordships, that the order under appeal be discharged and that an order be made in the terms which have been read to your Lordships, namely:—[His Lordship read the proposed form of the order,

which was afterwards settled and entered on the Journals of the House, see *post*, p. 711.]

LORD HATHERLEY:—

My Lords, I concur in the views which have just been expressed by my noble and learned friend on the woolsack, and I simply recapitulate the different heads under which those opinions upon the case have been pronounced, because I wish to shew that I have not omitted them from my consideration, but I do not go over them for the purpose of attempting to strengthen the reasons which have already been assigned. I think it of some importance that all of us who take part in this judgment should make it plain and clear that this was not a case to which the rule embodied in the Order XIV. should have been applied. I remember much discussion taking place in the Judicature Commission with reference to the course of procedure, now embodied in the rules which have been passed under the Judicature Acts. There was no doubt that the course which was taken with bills of exchange was that which it has been thought beneficial by the Legislature to carry into effect with regard to other proceedings. When an action has been brought upon a bill of exchange to which there is no real defence, the proceeding may be a short and summary one. But I am not now giving evidence as to what passed in the Judicature Commission. Anybody who looks at the directions which have been given and the rules which have been framed with regard to bills of exchange and promissory notes will see the analogy I refer to. I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him, as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Hatherley.

there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.

My Lords, it is plain, as it appears to me, upon the face of this transaction, when you consider the contract on which the legal proceedings were founded, that this was not such a case as was meant to be provided for by the species of legislation to which I have referred. In the first place, it was an action for an account upon deeds—deeds which have been executed, it is true, and which were not disputed. But it was evident that it was distinctly a matter of account, because you had, upon the face of the proceedings before the Judge, these circumstances. In the first place, the party so applying for a speedy remedy had himself already something to account for, namely, as mortgagee in possession he had to account for what had been done with reference to any money he had received as being such mortgagee; therefore there was, on the face of the matter, an account to be entered into. And, farther, the account was in itself of a very special character. It was not one so easily to be ascertained and settled by the short process which has been alluded to, it being an account under this contract or deed, which is very similar to the deeds executed usually with regard to building societies; it was evidently one requiring examination, but I do not say upon the ground of alleged fraud; upon that I shall have to say a very few words presently. There was nothing on that ground which should make a Judge pause; but, on the contrary, there was something, perhaps, that should make him rather more disposed to think that it might be a case in which exactly the very attempt was being made which was intended to be frustrated, namely, an attempt to prolong litigation by assertions made without any fact upon which to found them; and to bring, therefore, before the attention of the Judge matters which were not fit or likely to create any doubt in his mind; at all events, any doubt in favour of the Defendant.

But, my Lords, regard being had, as I said before, to this being a mortgage transaction, and there being a mortgagee in possession, it was clear that it was one of those cases which were never intended to be summarily disposed of unless it was by granting an account without delay, the deeds themselves being admitted. In this case the party was shut out from entering into any of those questions by the judgment being signed and execution ordered to issue, and being placed also under the condition of not having the benefit of that order without paying or giving security for a large sum of money in the first instance. I do not think that that was the intention of the Legislature; I speak now of the intent only as it is expressed in the words of the Legislature, and in the words which have been embodied in these rules.

So far, my Lords, I think the case is sufficiently clear. Upon the other and subordinate points which have been argued before your Lordships, the case being opened upon the account, I have nothing to add to what has been said by my noble and learned friend on the woolsack. I have very little to say except to express my acquiescence in that view.

There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Then, my Lords, we come to another point, and that is with reference to the question whether this is or is not a lottery. I will only observe upon that, that if this were held to be a lottery, nearly every one of the societies I have referred to, namely, building societies, and a great many other societies framed upon a similar footing, might be found to fall within the enactments against lotteries. But I apprehend that this is entirely wide and

H. L. (E.) 1880

WALLINGFORD v. MUTUAL SOCIETY.

Lord Hatherley.

far apart from the statutes which have been referred to. I do not think it necessary to say a word more upon that farther than to say that I entirely agree in the opinion which has been already pronounced.

The other question which was much argued before your Lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mortgages is a very good illustration, I think, of what the true principle is. The form adopted long since—I do not know whether it is still continued or not—in mortgages, was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent. to be reduced, in the event of your punctual payment, to 4 per cent.; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. If that definite and fixed time were exceeded, then the original contract revived in all its force. Sometimes mortgage deeds, being somewhat unskilfully drawn, interest at 4 per cent. was reserved by the contract to be raised to 5 per cent. if there was non-payment at a particular day; and although that brings the case to an extremely fine and nice distinction, it all the better illustrates the rule which has been applied at all times by the Courts, with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed, the indulgence lasts. When those terms are departed from the indulgence at once fails, and the original contract is revived in full force. The basis of the whole transaction, of course, is contract, and in this particular case we have before us a sum of £6000 in money or money's worth advanced on a given day, and the contract is that at a distant day a much larger sum, exceeding in fact, or nearly amounting to double the original sum, is to be paid by quarterly instalments, of which there are to be eighty. That contract is not only contained in the deed, but it is contained in the rules of the society under

which that mortgage deed is made as a security for the performance of those rules. There is nothing to prevent that contract being carried out to the full extent, especially now that the Usury Laws are at an end, and no question can possibly, as it seems to me, arise upon a deed framed as this is, as to whether or not it is a case of penalty or contract. The sum is plainly secured by a contract and that contract must be observed.

My Lords, I do not think there is any other question which has been discussed before us which I need advert to. I will only say that the form of decree which has already been communicated in part, or, I think, almost wholly to the parties, as being the form of judgment which your Lordships would be invited by my noble and learned friend, the Lord Chancellor, to pronounce, appears to me a correct form of decision to arrive at upon this case, which is somewhat complicated and rather tedious in its nature and character. I think that decree will render ample justice to all the parties concerned.

LORD BLACKBURN:—

My Lords, I also concur. I agree, without any alteration, to what has been said, that the leave to appeal against Mr. Justice *Manisty's* order to a Divisional Court ought to have been granted almost as a matter of course. I see no particular circumstances preventing it, when it appeared that there was no Divisional Court which actually sat till after the eight days to which the power to appeal is limited. I think also that when it appeared that it was agreed between the parties, there being time enough to appeal to the Divisional Court against Mr. Justice *Field's* order (which I think was a mistaken one), that that appeal should be taken along with the appeal under Mr. Justice *Manisty's* order, it ought to have been understood by the Court that the appeal against those two orders were taken together. That does not seem to have been understood, as I think it ought to have been.

Now comes the question, taking that as being so, was Mr. Justice *Manisty's* order the correct one? I think that it was wrong on one point, which is the one we shall now set right. On the other points, I think it was perfectly right. The order allows that a Plaintiff may swear positively that the money is due, and that

H. L. (E.) 1880

WALLINGFORD v. MUTUAL SOCIETY.

Lord Blackburn.

there is no defence to his action; and when he so swears the Defendant has "by affidavit or otherwise, to satisfy the Court or a Judge that he has a good defence to the action upon the merits, or disclose such facts as may be deemed sufficient to entitle him to defend." Unless he does so, the Judge may make an order allowing the Plaintiff to sign judgment.

Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the Plaintiff to sign judgment. If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary (which I can hardly conceive), that the Defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.

And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the Defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

So looking at the affidavits (they are very long and I will not go through them) which were used before Mr. Justice *Manisty*, I

think that in none of those particulars did the Appellant satisfy the burden that was cast upon him. He makes general statements of fraud, but nowhere does he condescend upon any particular of fraud, such as in my mind, if I had been in Mr. Justice *Manisty's* place, would have made me think that it was at all fit that he should be allowed to defend upon that ground. There are long statements resulting in saying that this society was illegal upon various grounds, which I cannot follow at all. One ground, among others, is, because there was a drawing of lots on one occasion, therefore it was illegal as coming under the Lottery Acts. I cannot think that that was a good ground of defence.

There was one point, and only one, which was argued a good deal here. I do not observe that it was urged in the Courts below, but it was argued by Mr. *Wills* here. He said taking the form of deed, the £11,000 and odd hundred pounds should be considered as a penalty to secure the repayment of the different instalments, and not as a debt which upon the non-payment of the instalments should be recovered. I do not think that that is tenable for the reasons which have in fact been assigned before. The object and the nature of the society here, and the whole terms of the bargain here were these:—If you choose to borrow the money, you shall name a sum which is to be added to the principal and to be repaid; and as it is the very essence of the society that we should have punctual payments, if you make default in paying the instalments, the whole sum shall become payable at once. Speaking not judicially, but as giving my own opinion, I do not think that a society framed upon a principle of this sort could have gone on anyhow, even if the instalments had been punctually paid; but it is self evident that unless the instalments were punctually paid the society must have stopped in a very short time indeed. The agreement between the parties was, and it is obvious that what they meant to agree was, that the £6000 and the £5000 odd in addition as the premium shall be a *debitum in præsenti* payable by instalments if the instalments are punctually paid, but if there be a default in paying them, then all is to be paid at once. That being the contract between the parties that is not the case of a penal sum. It is not necessary for the House probably to decide

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Blackburn.

that question, but if it were necessary to decide it I should say that it was not a penalty, but an actual sum, like the case of a promissory note payable by instalments, the whole to become due if one of the instalments is not punctually paid.

Passing by this my Lords, we come to the ground upon which I think Mr. Justice *Manisty* was wrong. Having regard to the sum which is sued for, it appears from the nature of things that it was necessary that an account should be taken. There was a mortgage deed and there were securities. I am not quite sure that the mere fact that there were mortgage deeds would have made it necessary to take an account, unless there had been something more. But there is something more here. In the second affidavit of Mr. *Wallingford* he does, although it is smothered over with a vast quantity of irrelevant matter, make a distinct averment that a part of the security being these trust notes, £300 of those trusts notes became payable, and that they, against his will, without his authority, re-invested in three trust notes of £80 each, making a sum of £240 in all. That £300, at least according to his view, would be a sum which they had actually realized from the securities, although they had chosen to re-invest it without his authority. If that had stood alone, it would have appeared that there was a ground, a plausible ground, in respect of that £300. When it came before the Court of Appeal, the matter was explained and it became clear that the ground upon which it was put, in that 20th section of his affidavit, was an utterly mistaken one, for when his affidavit is produced before us, and examined, it appears pretty clearly that it was with the full consent (if that account which was sent in is to be taken as genuine) of the Appellant that the sum of £240 was re-invested. But that same exhibit shews that the Appellant gave the Respondents credit for the first five instalments, £600 odd, as having been fully paid; and, as far as that goes, there is not merely something to shew *primâ facie* that there was a ground for making that defence, but that the defence was made out as far as regards that sum. Consequently when the order was made that unless he brought into Court the sum of £5000, or some sum which it was beyond his means to bring in, the Plaintiffs would sign judgment for the whole money, it was allowing them to sign judgment for a

sum greater than was really due. I do not think that that was right in any point of view.

It has been said, what was to be done then? That would be a difficult question to answer. The scheme which the Legislature (for these orders are under the authority of the Legislature) has adopted for working out this mode of preventing vexatious litigation, by not allowing a party to defend when there is no defence, and yet not depriving a party of his rights, is to have it worked out in Chambers. A Judge in Chambers exercises an equity—not a capricious equity, but all the equities which might be exercised either at Law or in Equity in the days when the two were distinct. But he has much more machinery for exercising his discretion than either a Court of Chancery, or a Court in Banc would have had; and consequently it has always—at least for some years past—been considered that a great many things could be worked out in Chambers, which probably no Court could have done, or which, if the Court of Chancery had done, it would have done at an enormous expense by affidavits and otherwise. Consequently if there was sufficient reason for saying that there should be an account as to some items, I am by no means clear that Mr. Justice *Manisty* would have been bound immediately to say that there should be the whole account. He would have been bound to say, there must be an account at least as to this sum, and as to the terms of it I will hear you both and see what is to be done. Possibly he might have worked it then so that the account should only have gone as to a part, and as to the remainder it should be considered as out of the account and as really due.

He might perhaps have done that in Chambers; but what has been actually done is this—there has been execution to the amount of £1300 levied. That standing as it does, then comes the question, what should be done to raise the real question? It may be that on taking the account it will turn out that the Appellant is not entitled to a deduction at all—it is more probable I think that he is entitled to a deduction, though only for some smaller sum; I do not say how that will be; but whatever it may be he must have the benefit of that deduction. I do not see my way to saying, in the circumstances here, however it might have been worked out in the Chambers, how the account can be taken upon one

H. L. (E.) 1880

WALLINGFORD v. MUTUAL SOCIETY.

Lord Blackburn.

item without being taken upon the whole. Consequently, I think that the form of order which has been read and proposed by my noble and learned friend on the woolsack comes as near as possible to doing complete justice in this case.

With regard to some parts of the proposed order, I think it might be a little doubtful whether the House had power to make the order without consent. I am not sure whether it had or had not, but that has been all obviated by its being agreed between the parties that as to the sale of the security it should be done.

I do not think there is anything farther upon which I need make any observation. I was not so much impressed by the indorsement on the back of the writ of a smaller sum to be levied as the noble and learned Lord on the woolsack is. No doubt the rule says that you shall indorse it with the proper sum to be levied, but that was not the old law. The old law was that you were to take care that you did not abuse the process of the Court by exercising it vexatiously. I see that the order was made by the Judges of their own authority as early as Hilary Term, 1853. I cannot find that the question was ever brought before the Court to say what would be the effect of it, but it is enough to say that here sufficient facts are disclosed to shew that the Appellant has a right to an account in respect of some sum. I do not see how that can be worked without taking an account of the whole.

The result is that I agree that the matter should be set right by taking the account, and I think the form of decree which has been read to the House is the proper one to make.

LORD WATSON:—

My Lords, I agree with the result at which your Lordships have arrived upon the various matters which have been discussed in the present appeal.

I think that the order of Mr. Justice *Manisty* has been well brought under review in this House. I take it that when the appeal was taken to the Divisional Court from his Lordship's decree it was incompetent for that Court to review the decree, but it was entirely within the competency of the Appellant at that time by presenting an appeal against the order in Chambers of Mr. Justice *Field* to have that order reversed and the time

enlarged, to the effect of enabling the Divisional Court to review Mr. Justice *Manisty's* order upon the merits. That, I think, with the consent of the parties, was what the Divisional Court actually did. The Judges there held the necessity of the appeal from Mr. Justice *Field's* order and the enlargement of the time, as dispensed with by the consent of the parties, and accordingly they proceeded in their order (the note of their opinion shews as I read it that they were dealing with the case in that way) as if it were an appeal upon the merits from the order of Mr. Justice *Manisty*.

That being so, I farther agree with your Lordships in holding that in this case the Appellant did, at all events by the second affidavit which he filed, disclose a case sufficient to entitle him to defend to the extent of having an account taken. It appears to me that his averments upon the other parts of his case, upon which he has argued very strenuously at your Lordships' Bar, are entirely irrelevant, that he stated no case shewing that this *Mutual Society* is a gaming or gambling society within the meaning of the statutes which he cited in support of his contention, and that he equally failed in stating any case of fraud.

My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of Common Law, I think the terms of Order XIV. would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the Defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

My Lords, the only part of the case upon which I felt some difficulty during the discussion was that which related to the character of the mortgage bond; the contention, I mean, on the part of the Appellant that the sum appearing to be due on the bond ought to be split into two, namely, a sum of £6000 as representing capital money advanced, and the sole debt due

H. L. (E.) 1880 WALLINGFORD v. MUTUAL SOCIETY. Lord Watson.

according to his contention, and a smaller sum of £5221 as representing interest or penalty, for it was put in both shapes.

Now, my Lords, whatever the law might have been, if the Appellant could have shewn that the substance of the transaction was as represented by him, it humbly appears to me that the contract to which he refers as supporting his contention does not support it. I think the substance of the transaction between the *Mutual Society* and the Appellant was this: that in compliance with the rules of the society he undertook an obligation precisely such as those rules contemplated, an obligation to pay a sum of £11,221 as the price of, or consideration for, the interest which he was to take in return in the society. I think it was the plain intention of these contracting parties that that sum should be paid and received, and no other sum is stipulated to be paid under the bond. No doubt there is a postponement of payment in certain events; and the bond might be read either as a contract for payment by eighty instalments, payment being accelerated against the mortgagor in the event of his default, or it might be viewed as a contract for immediate payment, with a right and privilege to the mortgagor to postpone that payment by making regular quarterly payments of instalments, each equivalent to one-eightieth part of the capital sum to be paid. But, my Lords, whichever of these views be taken, I do not think it possible to bring that within the cases of penalty or to bring it within the rule that would entitle the Appellant to relief in equity. It seems to me to be a plain case of contract to repay that capital sum, and there being no illegality in the contract, it does not appear to me that he is entitled to have it held to be penalty or to ask relief.

My Lords, I fully agree that the order which your Lordships propose as that which should be made by this House will entirely meet the justice of the case. I think, my Lords, that it is very satisfactory that your Lordships have been able to indicate an opinion upon points which it is not necessary to decide in this case, because these taken along with the admissions which have been made at the Bar will narrow to a very great extent the discussion upon the merits of the case, and that is exceedingly desirable, as otherwise the sole result of your Lordships' judgment

would be to find that, after all the litigation which has taken place, the Appellant is entitled now to begin litigation anew.

Order appealed from reversed. Cause remitted to the High Court with the Declarations and Directions already read to the House.

The following Order was afterwards entered on the Journals:—

It is *Ordered* and *Adjudged*, That the said Order of Her Majesty's Court of Appeal, of 21st of November, 1878, complained of in the said appeal, be and the same is hereby reversed: And it appearing to this House that the motion by way of appeal before the Common Pleas Division of Her Majesty's High Court of Justice on the 2nd day of November, 1878, was, by consent of the parties, treated as an appeal from the order of Mr. Justice *Field*, dated the 30th day of October, 1878, as well as from the order of Mr. Justice *Manisty*, dated the 6th day of September, 1878, it is *Declared*, That the application of the Appellant to Mr. Justice *Field* to enlarge the time for appealing against the order of Mr. Justice *Manisty* ought to have been granted; and that such time ought now to be treated as having been enlarged till the 2nd day of November, 1878, when the motion by way of appeal to the Divisional Court was made: And it is *Declared*, That the order of Mr. Justice *Manisty*, dated the 6th day of September, 1878, ought to have been discharged by the Divisional Court, and that the Appellant ought to have been allowed to defend the action without making any payment into Court or giving security to the satisfaction of the Master, but only for the purpose of having the amount due to the Respondents under the several mortgage bonds on which the action was brought properly ascertained by an account to be taken

H. L. (E.)
1880
WALLINGFORD
v.
MUTUAL
SOCIETY.

under the direction of the Court; and that, if judgment were signed, it ought to have been as security only for what might be found due on taking such account: And it is *Ordered*, That the Common Pleas Division of Her Majesty's High Court of Justice do direct such account to be taken: And it is *Declared*, That in taking such account credit ought to be given to the Appellant for all sums received by the Respondents, or which, without their wilful default, ought to have been received by them under the said mortgage bonds, or from any of the securities comprised therein; and the Appellant and Respondents respectively consenting thereto: It is hereby *Directed*, That the sum of £1300, levied under the execution issued, be paid by the Respondents into Court to abide the result of the said account; and, by the like consent, it is *Declared*, That in taking the said account credit is to be given as on this day to the Appellant for the sum of £2000 as the value of the land forming part of the security under the mortgage bond bearing date the 25th day of March, 1874, which land is to be taken over by the Respondents' society absolutely at that price, the Appellant undertaking to forego all right to redeem such land, and to execute all necessary assurances to confirm the Respondents' title to the same, and the Respondents undertaking to pay to the Appellant in cash and not by way of dividend any sum which, on taking the said account, may be found due to them, to an amount not exceeding the said sum of £2000; and, by the like consent, it is *Ordered*, That any other securities comprised in the said mortgage bonds which may not hitherto have been realized be got in and converted into money, under the direction of the Court, and the proceeds thereof applied in pay-

ment of what, if anything, may be found due to the Respondents on taking the said account, or otherwise, as may be just: And it is *Declared*, That the judgment signed and the execution issued in the action ought to stand as a security only for such ultimate balance, if any, as may be found due to the Respondents upon the result of the said account: And it is *Declared*, That the costs in this House, and in the Courts below, including the costs of the said petition presented by the Appellant to this House on the 23rd day of February last, praying that certain statements in the printed case of the Respondents might be expunged therefrom, ought to abide the result of taking the account, and that such costs be paid by the Respondents to the Appellant if the balance found to be due at the time of the execution issued shall fall short of the sum indorsed on the writ as that directed to be levied and paid by the Appellant to the Respondents, if such balance at the time last aforesaid shall be found to have amounted to or to have exceeded that sum: And it is *Ordered*, That the amount of the costs incurred in this House in respect of the said appeal, and of the said petition of the Appellant to expunge certain statements in the Respondents' printed case, be certified by the Clerk of the Parliaments: And it is farther *Ordered*, That the cause be, and the same is hereby remitted to the Common Pleas Division of Her Majesty's High Court of Justice to do therein as shall be just and consistent with these declarations, directions, and judgment.

Lords' Journals, 8th June, 1880.

Solicitors for Appellant: *Purkis & Perry.*

Solicitors for Respondents: *Linklater, Hackwood, Addison, & Brown.*

Applied. *Re* HOOPER. [1948] Ch. 586

Applied. *Re* HOOPER'S SETTLEMENT TRUSTS. [1948] 2 All E.R. 261.

[HOUSE OF LORDS.]

H. L. (E.) HENRY PEARKS . . . . . APPELLANT;

1880 AND

July 5, 6, 8. WILLIAM MOSELEY AND OTHERS . . . RESPONDENTS.

(*In re* MOSELEY'S TRUSTS.)

Will—Bequest to a Class—Remoteness.

17 Ch D 225
226
18 Ch D 444
445.

In ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule.

The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members.

Per THE LORD CHANCELLOR (Lord *Selborne*):—In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness.

A will contained a bequest of a particular sum of £3000 to the testator's daughter and her husband for life, and after their deaths "my will is that the sum of £3000, the securities for the same and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of £3000 was given to the son with exactly the same trusts for his issue; in default, over.

Held, that the bequest was void for remoteness.

Held, also, that the bequest being to a class, the parts of it could not be severed, so as to treat one portion as good, though the other was void.

Hale v. *Hale* (1) approved.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous decision of the Master of the Rolls (2).

Joseph Moseley, by a will dated in April, 1831, bequeathed his personal estate to trustees to convert the same into money, and to hold the produce upon trust as to the sum of £3000, part thereof,

(1) 3 Ch. D. 643. (2) 11 Ch. D. 555.

to pay the income to his daughter *Mary Jordan* for her life for her own separate use and benefit, free from the interference or engagements of her then or any future husband. And as to the disposition of this sum after her husband's death and her own, the trust was declared in the following words: "And from the decease of my said daughter my will is that the sum of £3000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease, or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

The will then proceeded to give to the testator's son *William Moseley* the interest of the other £3000, part of the said money so directed to be invested, for his life. "And from his decease I declare and direct that the said sum of £3000, or the aforesaid trust securities thereof and their produce, shall be upon the like trusts for his children and issue, as are hereinbefore declared of the trust money and fund for the benefit of the children of my daughter *Mary Jordan*, and in default of such issue of my son *William*, then in trust for my grandson *Samuel Moseley*, his executors and administrators." And, after certain legacies, &c., the residue of the personal estate was bequeathed to the same grandson.

The testator died in May, 1831. The will was proved in August of the same year, and the two sums of £3000 were duly raised out of the testator's estate. The testator's son, *William Moseley*, married and had three children, two of whom died young and without having been married, and the third, a daughter, *Harriet*, came of age in 1859, and on the 14th of April, 1863, married *Henry Pearks*. On their marriage a settlement was executed giving them a joint power of appointment over the fund, subject to which it was to be for the separate use of *Harriet* for life, and after her death for her husband. This power of appointment was never exercised. *Mary Jordan* had several children, some of whom died unmarried, five of

H. L. (E.) 1880 PEARKS v. MOSELEY.

them attained twenty-one in her lifetime, two of these died, and the remaining three survived her. In December, 1870, the three children of *Mary Jordan* who survived her and the representatives of her two children who died in her lifetime presented a petition praying for payment of the legacy of £3000 to them. The petition was served on *Harriet Moseley* who was the representative of the residuary legatee. In January, 1871, the petition was heard by Vice-Chancellor *Malins*, who held that the gift was not void as infringing the rule against perpetuities, and he therefore made an order in accordance with the prayer of the petition (1). The testator's son, *William Moseley*, died in September, 1877. The money was paid into the *Bank of England* on the 1st of December, 1877, under the provisions of the *Trustees' Relief Act*. On the 14th of December, 1877, *Harriet Moseley*, the representative of the residuary legatee, presented a petition praying for payment to her of the sum so paid into Court. In the same month *Henry Pearks* presented a petition that the money might be paid out to him. Both petitions came on to be heard by the Master of the Rolls, who, thinking on the authorities the bequest to be void, ordered the money to be paid to *Harriet Moseley* as the legal personal representative of *Samuel Moseley*, the testator's grandson, the residuary legatee (2). Mr. *Pearks* appealed against this decision, which was affirmed by the Lords Justices, who held (following, though with avowed reluctance, *Smith* v. *Smith* (3)), that the gift to the children could not be severed from the gift to the remoter issue, but that the whole gift was void as infringing the rule against perpetuities (4). This appeal was then brought.

Mr. *Chitty*, Q.C., and Mr. *W. Barber* (Mr. *Romer* was with them), for the Appellant:—

The gift of the £3000 in favour of the children of *W. Moseley* was not a gift to the children and the issue as one undivided and indivisible class; there were two gifts, which might be severed, and one part remain good, though the other might not be capable of being sustained. The class of the children was ascertainable at the death of *William Moseley* the tenant for life. Their interests

(1) Law Rep. 11 Eq. 499.
(2) 11 Ch. D. 555.
(3) Law Rep. 5 Ch. App. 342.
(4) 11 Ch. D. 558.

then became absolutely vested. *Harriet*, his only child (who married *Henry Pearks*), then took an absolute vested interest in the £3000, and that interest was not affected by the subsequent provisions in the will. Those provisions which related to the after-born issue might be separated from the original gift to the children: *Cattlin* v. *Brown* (1). Mrs. *Pearks's* interest being vested and indefeasible was taken after her, in succession to her. The rule supposed to be established by *Smith* v. *Smith* (2), which would make the whole gift void, because one part (which could easily be separated from the rest) was so, was itself erroneous, and had not met with the approbation of all subsequent Judges. Even those who felt themselves bound to follow it expressed, as the Lords Justices had done in this case itself (3), their non-concurrence with it. The whole tendency of the reasoning of Mr. Baron *Rolfe*, in the opinion given by him as one of the consulted Judges to the House of Lords, in the case of *Dungannon* v. *Smith* (4), was unfavourable to the doctrine now asserted to be established by *Smith* v. *Smith* (2), although in the case in which he was speaking, the words of that particular devise were in violation of the law against perpetuities. And the doctrine stated in *Smith* v. *Smith* (2) was certainly not in accordance with that declared in *Cattlin* v. *Brown* (1). The judgment there was expressly approved by the late Master of the Rolls in *Webster* v. *Boddington* (5), his decision in which proceeded on another ground. Nor was the doctrine now contended for approved in *Salmon* v. *Salmon* (6). In *Wilson* v. *Wilson* (7) there was a gift by will to the present and future children of *J. L.* who should be living at the decease of the testator's wife, with a direction that the shares of the daughters should be settled on themselves for life with remainders to their children, and it was held that the gift was not void for remoteness as regarded the share of a daughter born in the testator's lifetime, the bequest being treated as a separate gift to each child, which absolutely vested in each within due limits of time, and which was not affected by any condition afterwards provided.

(1) 11 Hare, 372.
(2) Law Rep. 5 Ch. Ap. 342.
(3) 11 Ch. D. 558–559.
(4) 12 Cl. & F. at p. 574.
(5) 26 Beav. at p. 137.
(6) 29 Beav. 27.
(7) 28 L. J. (Ch.) 95.

H. L. (E.) 1880 PEARKS v. MOSELEY.

Effect ought to be given to what is the plain intention of the testator, in preference to a very strict application of the rule against remoteness, by which that intention must be entirely defeated.

Mr. *Waller*, Q.C., and Mr. *Davey*, Q.C. (Mr. *Rawlinson* was with them), for the Respondents, insisted that the rule as to perpetuities, and as to the impossibility of separating, in a gift to a class, one portion from another, which had received its final exposition in *Smith* v. *Smith* (1), had been well established by previous authorities: *Jee* v. *Audley* (2); *Leake* v. *Robinson* (3); *Greenwood* v. *Roberts* (4); *Webster* v. *Boddington* (5); *Hale* v. *Hale* (6): and whatever opinions might exist as to the soundness of the reasons for the rule, it was too well settled to be now called in question. In the earliest edition of *Jarman* on Wills it had been recognised as even then being a settled rule (7), that learned writer using these words with regard to it, "It is to be observed that where a gift to a class extends to objects too remote, the fact that some of the objects eventually comprising the class were actually born within the period allowed by the rule of law, will not render the gift valid *quoad* those objects" (7): and in another place he says (8), "The fact that the gift might have included objects too remote, is fatal to its validity." *Seaman* v. *Ward* (9) declared that where there is a gift to a class some of the objects of which are too remote, and some not, effect cannot be given to the latter separated from the former, but the whole gift is void.

Mr. *Glasse*, Q.C., and Mr. *Darley*, appeared for other parties interested, but did not address the House.

Mr. *Chitty* replied.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, this case raises a question which, speaking for myself, I am surprised to find raised at this time upon the law of remote-

(1) Law Rep. 5 Ch. Ap. 342.
(2) 1 Cox, 324.
(3) 2 Mer. 363.
(4) 15 Beav. 92; 21 L. J. (Ch.) 262.
(5) 26 Beav. 128.
(6) 3 Ch. D. 643.
(7) Vol. i. p. 231.
(8) At p. 233.
(9) 22 Beav. 591.

ness. As I regard the case, the question so raised is one which has been long since conclusively determined by authority, and the arguments, by which it is attempted to distinguish this case from the former authorities, do not appear to me to be capable of being maintained.

The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law.

So understanding the rule, the first question in every case of this kind is that of pure and simple construction—what is the meaning of the words which the testator has used? What would their effect be, if there was no law of remoteness? So approaching the present will, I cannot avoid coming to the conclusion, that the words upon which everything turns, ("which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue living at his, her, or their decease or deceases respectively,") are words of description, and not words of superadded condition. If you could find in this will a gift simply to "all the children of" the testator's "daughter who shall attain the age of twenty-one years" (I am reading that gift to which the present is referential), "and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases"—if you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time; and it would be im-

H. L. (E.)
1880
PEARKS
v.
MOSELEY.
Lord Selborne, L.C.

material, if in a later part of the will you found, as to some particular share or shares, superadded conditions which might or might not be void, by reason of remoteness or otherwise. But in this case, if there was no law of remoteness, I am satisfied that no Court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take; "which issue shall afterwards attain the age of twenty-one years," and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: "For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority." If that were so, there can be no question that the gift to the issue would be void for remoteness; and then arises the ulterior question, whether it is possible to sever the gift to that issue from the gift to the children, so as to enable the one to stand, while the other must fall.

My Lords, I find that the Master of the Rolls, in the case of *Hale* v. *Hale* (1), expressed an opinion upon the construction of this very will, with which I agree. He says (2): "As I read the gift, it was the issue which should afterwards attain the age of twenty-one years. That was a part of the description of the issue, and therefore it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue. There is no gift to the issue as such—only to such as attain twenty-one." And he points out that Vice-Chancellor *Malins* in the case of *Moseley's Trusts* (3), which has been so frequently mentioned in the argument, made that mistake in the reasons which he gave for his decision. It does appear to me, though there may be some expressions in Vice-Chancellor *Malins's* judgment in the case of *Moseley's Trusts* (3) which may perhaps go farther, that the view which is most calculated to reconcile all parts of that judgment is, that he thought you could properly treat the whole class as necessarily ascertained within twenty-one years from the death of the testator, and the ulterior condition, that the issue should attain twenty-one, as something superadded, and not forming part

(1) 3 Ch. D. 643.
(2) 3 Ch. D. at p. 649.
(3) Law Rep. 11 Eq. 499.

of the description of the issue. If so, I cannot agree with that view of Vice-Chancellor *Malins;* I am obliged to agree with the view of the Master of the Rolls.

Some other cases, one of which was before Vice-Chancellor *Knight Bruce*, *Riley* v. *Garnett* (1), and another more recent case before the present Master of the Rolls, *Muskett* v. *Eaton* (2), were referred to; in which, under words of apparent contingency more or less like this, it was nevertheless held, that real estate, given in remainder, vested in the whole class of children or issue, subject to be divested if they should not fulfil that condition. I consider that whole class of cases, which is very well known, to be inapplicable to the construction of gifts of personal property, such as you have to deal with here. There are some peculiar rules of law applicable to limitations of real estate; one of which is, that a contingent remainder must take effect at the time of the termination of a previous freehold estate, or not at all, unless it is supported by a fee vested in trustees; and in order to avoid the manifest disappointment of the intention of testators, and the destruction of a whole series of limitations which might result from that rule, the Courts have in some cases leant to what I may describe as a rather violent and unnatural construction of words of contingency of this kind, and have treated them as descriptive, not of a condition upon which the property was to vest, but of a condition subsequent, on non-fulfilment of which it was to become divested.

In *Riley* v. *Garnett* (1), Vice-Chancellor *Knight Bruce* referred to the class of authorities on which he was proceeding; mentioning one of them, *Doe* v. *Nowell* (3). The report of *Doe* v. *Nowell* (3) refers to the earlier authorities, beginning with *Boraston's Case* (4), and including *Edwards* v. *Hammond* (5), *Bromfield* v. *Crowder* (6), and others, extremely familiar to all persons conversant with the law of real property. The rule of construction adopted in those authorities depends partly upon the law as to contingent remainders, and partly upon the principle, that, as to real estate, the Courts are always unwilling to hold the fee to be in abeyance.

(1) 3 De G. & S. 629.
(2) 1 Ch. D. 435.
(3) 1 M. & S. 327.
(4) 3 Co. 19.
(5) 3 Lev. 132.
(6) 1 B. & P. (N.R.) 313.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Selborne, L.C.

None of these considerations properly applies here; and I am not aware that they have ever been applied, to gifts of personal estate. Therefore, in point of construction, I come to the conclusion that these words which raise the question are words of description; that they describe the issue who are to take; and that there is no gift to any issue who do not fulfil those descriptions.

My Lords, that introduces the other question, which was principally argued by the counsel for the Appellant; whether (as Vice-Chancellor *Malins* put it in a passage of his judgment in *Re Moseley's Trusts* (1), which really points out what is the true question to be determined), you can or cannot sever the shares, whether you can, within proper limits of time, ascertain the whole number of the class—which is the same thing as the whole number of the shares—and whether it is, as he says later in the same page, "in effect a gift of a legacy to be divided into as many shares as there are children." If that were so it would be good, because the children must necessarily be ascertained within due limits of time; and, as I said before, it would not signify what afterwards became of any particular share, any more than in the case of *Cattlin* v. *Brown* (2), to which reference was made. But, my Lords, the question is, are there here two classes, or is there one class compounded of persons answering one or other of two alternative descriptions? Can you or can you not ascertain the number of shares and of sharers within the necessary limits of time?

That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it, by looking to the way in which the events actually turned out at any later time. The gift in this case is to all the children of *William Moseley* who should attain the age of twenty-one years, and the lawful issue who should attain twenty-one years (taking *per stirpes*) of such of them as should die under that age. At the death of the testator *William Moseley* was unmarried. The testator died in May, 1831, and *William Moseley* married in November of the same year. It was at that time absolutely uncertain, whether he would ever have any child who might live

(1) Law Rep. 11 Eq. 499. (2) 11 Hare, 372.

to attain the age of twenty-one years. The whole class might have consisted of remoter issue, who might not attain the age of twenty-one within twenty-one years from the death of *William Moseley*. Not only could you not know with certainty who might be the particular members of the class, and say they must come into existence within the necessary limits of time; you could not then ascertain so much even as a minimum share to which any particular members or member of that class must, at all events, be entitled. It was uncertain whether the whole class might not eventually consist of those who would be directly affected by the vice of remoteness. How can you possibly say that there were any shares which would necessarily be ascertained, under these circumstances, within due limits of time? Still more, how could you tell how many such shares there would be?

The argument which has been offered is really this, that where a class is so defined, that certain members of it, if they come into existence at all, and if they fulfil the required conditions, must come into existence and fulfil those conditions within due limits of time, then those persons, if there was no law of remoteness, would on fulfilling those conditions within those limits of time, be entitled to a share, of which you could not, indeed, tell what the full amount would be till all the other shares were ascertained, but which at all events never could be less than a certain sum. That, my Lords, is true: but the conclusion sought to be founded upon it, that you can therefore sever such shares from others which may not be capable of being ascertained within the same limits of time, seems to me not to follow. A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members.

That was really the point decided in the case of *Leake* v. *Robinson* (1), because there I think four members of the class were born before the death of the testator, as to some, if not all, of whom it is manifest upon the report, that, as things stood at

(1) 2 Mer. 363.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Selborne, L.C.

the time when the testator died, they must necessarily have attained the age of twenty-five years (which was the condition)—if they lived to attain it at all—within twenty-one years from the death of the testator. It was strongly argued that they ought to be severed from the rest; and, in fact, the very same argument which has been addressed to your Lordships in this case would have been equally applicable to that; because it could make no difference in principle, that they stood in the same degree of relationship to the testator, and were all the children of one father and mother.

What Sir *William Grant* said about that argument, and the way in which he disposed of it, was this (1): "To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals or (what he had as little in his contemplation) distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."

Mutatis mutandis, that passage appears to me to be applicable here; because it can make no difference, in principle, that here, the class being *per stirpes*, some of the *stirpes* are represented by issue of one generation, and others of the *stirpes* are represented by issue of another generation. The rule as to vesting must be exactly the same, which would have been applicable if the gift had been in this form: "in trust for all the children of my said daughter who shall attain the age of twenty-one years, or die under that age leaving issue who shall afterwards attain the age of twenty-one." In that case the children, and the children only, would have taken; that is to say, if there had been no law of remoteness, the children who were dead would have taken trans-

(1) 2 Mer. at p. 390.

missible interests, depending upon the attainment of twenty-one by issue whom they might leave surviving them; interests which would have been part of the personal estate of the parent, and would not have gone to the issue. As far as the principle of class is concerned, it makes no difference whether the gift might be in that form, in which beyond all controversy it would have been void, or in the form in which you find it here, where the parent is to be represented by the issue, and grandchildren substituted for children—substituted, that is to say, as original takers taking original shares, and not in the sense, which is extremely different, of persons taking by way of gift something which had previously vested in their parent, and afterwards had been divested.

I forbear from going farther into the matter, for this reason; that the whole question raised upon this will has been carefully and elaborately considered and examined by the Master of the Rolls in the case of *Hale* v. *Hale* (1). With every part of that judgment I agree; and that judgment anticipates the entire argument which has been used here. He says (2): "The class you could ascertain in one sense; you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say, at the testator's decease, that in no case could the whole class exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four" (that was the age in the case of *Hale* v. *Hale* (1)) "after the legal period; and then that share ought to come back to the others if you could divide it; but if you could not, it must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not." "The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a

(1) 3 Ch. D. 643.
(2) 3 Ch. D. at p. 646.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Selborne, L.C.

certain share. That being the state of the law, could you sever the shares? That is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more." The testator's death of course was a much more favourable period for that argument than what we have to deal with here. Then he goes on: "As I understand it, *Leake* v. *Robinson* (1), and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this Court, which had held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject." The Master of the Rolls refers to some of them.

I must own that I feel some degree of surprise, after that very careful and well reasoned judgment, that encouragement should have been given to the Appellant to bring this question to your Lordships' Bar. It may be that if *Jee* v. *Audley* (2), *Leake* v. *Robinson* (1), and a long series of cases which have followed them, had never been decided, the Courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible of the intention of testators, and sacrifice only, if they could discover it, the real excess. But whatever one might have thought of the possibility of doing this, if the question had been entirely free from decision, it has been long since settled and determined; and I apprehend that now no authority less than that of the

(1) 2 Mer. 363. (2) 1 Cox, 324.

Legislature can alter it. I must therefore move your Lordships that this appeal be dismissed with costs.

LORD PENZANCE :—

My Lords, I confess that upon hearing this case opened and referring to the judgment which your Lordships are now asked to set aside, I felt considerable difficulty in coming hastily to any conclusion that the case of *Smith* v. *Smith* (1), to which reference was made, was one that ought not to be examined with regard to the propriety of the reasoning contained in it; for, the Lords Justices in the judgment from which this appeal is made, although they felt themselves, as they said, bound by that case, threw out suggestions, in very unmistakeable terms, that, but for that case, they would have been of a contrary opinion; and the great respect that I have for the Lords Justices induced me to look very vigilantly at that case of *Smith* v. *Smith* (1), under such circumstances, in order to see whether there was room for any reconsideration of the principles contained in that case with a view to their alteration.

But, my Lords, on referring to the judgment of the Vice-Chancellor with which the Lords Justices said they entirely agreed, I find myself in great difficulty, because the Vice-Chancellor's judgment appears to me to have proceeded upon a supposition that the language of the will was different from what it really was. The learned Vice-Chancellor says "here the number of objects must be ascertained within twenty-one years after the death of the testator." "It is," he says, "*to the children who attain twenty-one and the issue of those who die under that age;* so that necessarily you ascertain the whole number of the class within a life in being and twenty-one years."

But, my Lords, it is not so. That is not the provision of the will. The provision of the will is to "the children of the daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die under that age," . . . "which issue shall afterwards attain the age of twenty-one years." It is those words that, according to those who wish to hold this gift void, bring the case within the operation of the law against perpetuities,

(1) Law Rep. 5 Ch. Ap. 342.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Penzance.

and the judgment of the Vice-Chancellor omitting those words altogether fails to meet the case which is here alleged against the gift.

Now, my Lords, that being the case, I thought it desirable to look a little into what is the principle upon which all previous cases have proceeded. We are asked to set aside the judgment, or at least to differ from the judgment, in *Smith* v. *Smith* (1); but as far as I can see your Lordships must not only do that, but you must differ from the principle contained in the case of *Hale* v. *Hale* (2), the principle contained in the case of *Bentinck* v. *The Duke of Portland* (3), and not only that but also in the case of *Leake* v. *Robinson* (4). I should have quoted to your Lordships the language of the Master of the Rolls, Sir *William Grant*, in *Leake* v. *Robinson* (4), but my noble and learned friend the Lord Chancellor has already done so, and I do not repeat it. It is quite plain, as it seems to me, from the language there used that the principle of *Leake* v. *Robinson* (4) directly applies to this case. My Lords, the Master of the Rolls in *Hale* v. *Hale* (2), dealing with that principle, says this: "A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being;" in other words, unless the objects can necessarily be ascertained within the legal period. That I take it is a proposition which nobody disputes.

Upon that it is contended that where the gift is to a class that may consist of several members, and you can ascertain the maximum number of that class, you should hold valid the bequest to such members of that class as are within the period prescribed by the law against perpetuities, and invalid with regard to those who are without that period. That is a proposition which, as the Lord Chancellor has already said, is one that might very well have been been debated a hundred years ago, and might be worthy of consideration now, if the question now were one of legislation; but in the present day, after all that has passed, after the decision in *Leake* v. *Robinson* (4) and all the cases that have followed it, it appears to me that that is a contention which would

(1) Law Rep. 5 Ch. Ap. 342.
(2) 3 Ch. D. 643.
(3) 7 Ch. D. 693.
(4) 2 Mer. 363.

be directly in the teeth of those cases, for it was not only *Leake* v. *Robinson* (1) which enunciated that doctrine, but a case in your Lordships' House of *Dungannon* v. *Smith* (2) distinctly adopted it. It was there said that where a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a Court can so mould it as to say that it is divisible into two classes, one embracing the lawful and the other the unlawful objects of his bounty. Therefore, your Lordships have a decision in your own House distinctly adopting the principle of *Leake* v. *Robinson* (1).

These being the principles on which the matter rests, then comes the question of the construction of this will. Now, under the will could the objects of the testator's bounty be ascertained within the life or lives in being, or within twenty-one years afterwards? The primary object of his bounty was *William Moseley*. Well, of course, he was ascertained. Then there are the children of *William Moseley*. *William Moseley* was the life in being, and when he died of course his children could be ascertained. Then there is another portion of the objects of his bounty—there are these children of the children who died under twenty-one—so many children of the children, or in other words, so many of the grandchildren, as should live to the age of twenty-one. It is impossible to say you could ascertain the number or the existence of such persons within the life of *William Moseley*, or of any other life in being, and twenty-one years afterwards. Therefore, supposing that the will received its natural construction, and the words upon which so much has been said, beginning within the words "which issue shall afterwards attain the age of twenty-one years," be considered part of the description, it is unquestionable that you could not ascertain of how many members that class would consist. If *William Moseley* had three children (which he had) you could ascertain that there never could be more than three shares, each child having one; but you could not ascertain, without going to a period beyond the period prescribed by law, how many of those children would leave children that would attain the age of twenty-one, themselves dying under twenty-one. Therefore I think it is unquestionable that although you might ascertain the minimum, you could not ascer-

(1) 2 Mer. 363. (2) 12 Cl. & F. 546.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Penzance.

tain the actual share of the persons entitled under this description to the testator's bounty.

My Lords, that being so, the only question that remains (and indeed that seems to me the only question that exists in the case) is whether you can possibly so twist (I might almost say) the language the testator has used, as to consider that the first part of that bequest contained a description of the class, and that the words which follow, "which issue shall afterwards attain the age of twenty-one" were words of condition subsequent or of defeasance. That seems to me to be the only practical question and the only way in which any question could be raised upon this will, consistently with the decisions that have gone before.

Now it was very ably argued by Mr. *Chitty* that cases had existed in which words of this character have received a construction of that kind, but, as my noble and learned friend on the woolsack has pointed out, those cases were cases of a peculiar description. They were not cases applicable to personal property; they were not cases in any degree *in pari materiâ*, or of similar character with the present; and, above all, they were not cases in which this law of perpetuities came in question, in respect of which it has been laid down and taken as an axiom of interpretation, that you should construe the will first according to its natural meaning, without any regard to the effect which that meaning might have according to the law of perpetuities, and afterwards apply that law. Therefore, I do not think those cases are cases which your Lordships should adopt as a rule for construing this will.

But the case of *Festing* v. *Allen* (1), to which allusion has been made, is a very strong case to the opposite effect. There the words were not "which issue shall attain the age of twenty-one," but "who shall attain that age." Now I suggested in the course of the argument that whether the words "which issue shall attain" or "who shall attain" are used, the meaning cannot be different. It is impossible, I think, to suggest that there is any difference between the meaning which naturally flows from the use of the words "which issue," and the meaning which flows from the use of the word "who." They seem to me to be alternative expres-

(1) 12 M. & W. 279.

sions for the same idea. In *Festing* v. *Allen* (1) the word was "who," and there was a most distinct decision, after some consideration, pronounced by Baron *Rolfe* in the Court of Exchequer in that case, that the words "who shall afterwards attain the age of twenty-one years," formed part of the description.

It seems to me, therefore, my Lords, that whether you look at the construction of this will, as if no such question had arisen before, and construe the language according to its natural meaning, or whether you look at a case like *Festing* v. *Allen* (1), where the matter has been the subject of previous decision, your Lordships can arrive at no other conclusion than that the meaning of this clause in the will was, that a class should be created to consist, in the first place, of the children of *William Moseley*, and, in the second place, as part of the same class, of their children, if those children should attain the age of twenty-one years. That is the common sense meaning of the clause, and it is also a meaning consistent with the case to which I have just drawn attention.

I will only add that, as regards the judgment of the Vice-Chancellor in the present case, that judgment is in entire accordance with a previous judgment of his in the case of *Re Moseley's Trusts* (2), and that, on that case being cited before the present Master of the Rolls in *Hale* v. *Hale* (3), the Master of the Rolls dealt with the judgment of the Vice-Chancellor, as it appears to me, in a way with which I should have entirely agreed, and explained that that judgment could only have been arrived at, and was arrived at, by omitting the most material part of the will—I mean material in the sense of its creating the difficulty against which the Appellant has now struggled.

Under these circumstances, I agree that the decision of the Court below should be affirmed.

LORD BLACKBURN :—

My Lords, I am entirely of the same opinion.

This case comes in a peculiar manner before this House. The Master of the Rolls, when he had it before him, said, and said correctly, that the case of *Smith* v. *Smith* (4) was precisely in

(1) 12 M. & W. 279.
(2) Law Rep. 11 Eq. 499.
(3) 3 Ch. D. 643.
(4) Law Rep. 5 Ch. Ap. 342.

H. L. (E.) 1880 PEARKS v. MOSELEY. Lord Blackburn.

point, and, being a decision in the Court of Appeal, he must follow it. In the Court of Appeal the learned Judges also said "the case of *Smith* v. *Smith* (1) is precisely in point, and we are as much bound to follow it as the Master of the Rolls was;" but each individual Judge in the Court of Appeal said that he did not agree with the reasoning of *Smith* v. *Smith* (1), but they did not enter into the details, or shew us how or why they did not agree with that reasoning. That has occasioned to me, all through, the great embarrassment I have felt in this case, for I apprehend it is never safe to say that a man's opinion is wrong until you appreciate the arguments which have led him to that opinion; and up to this moment I am unable to find out what were the arguments which led the Judges of Appeal to say that they thought the decision in *Smith* v. *Smith* (1) was wrong.

I could perfectly well understand that it might be said originally, if the thing were beginning *de novo*, that it operates at times very harshly, and in this particular case it does operate extremely harshly, that where part of a class are out of the limits of perpetuity, the whole interest of that class should be void, and that that one—in this case the only one who existed of that class, and who was not beyond the limits of perpetuity—is to take nothing—the whole being void. I perfectly understand that it could be said that that was a thing against which, although it was originally so determined, there was a great deal to be said, but there would also be a great deal to be said in its favour. But then I do not think that can be the ground upon which the Lords Justices of Appeal went, because it certainly seems clear that that has, at least since the time of the decision of Lord *Kenyon*, or at all events since the decision of Sir *William Grant*, more than sixty years ago, been considered positive and settled law, and there has been no dispute at all about its being law; and now it is no more competent to your Lordships' House to say that you will reverse that long-established law than it was for the Court below, the Court of Appeal, to do it.

But I do not think that it could have been upon that ground that the Court of Appeal went, for Lord Justice *James* refers to the reasoning of Vice-Chancellor *Malins* in *Re Moseley's Trusts* (2),

(1) Law Rep. 5 Ch. Ap. 342. (2) Law Rep. 11 Eq. 499.

and says that but for *Smith* v. *Smith* (1) "I should without any doubt or hesitation have concurred in that conclusion, and I rather think that the Master of the Rolls would have done so too."

Now, my Lords, the strange and peculiar thing there is, that when we look at the reasoning of the Vice-Chancellor in *Re Moseley's Trusts* (2), in which Lord Justice *James* supposes the Master of the Rolls would have concurred, we find that in *Hale* v. *Hale* (3) the Master of the Rolls gave a long and elaborate judgment, the pith and object of which was to shew that he did not agree with the reasoning of Vice-Chancellor *Malins* in *Re Moseley's Trusts* (2), and I confess myself, upon looking at the matter, I have been puzzled to make out what was the ground on which the Court of Appeal went.

However, my Lords, putting that aside, I at once agree with what my two noble and learned friends who have spoken before me, have said. It seems to me that in the first place, it is established by a long series of authorities, that if the gift be to a class some of whom are beyond the limits in the way of remoteness, the whole is void—I regret that it is so in this case, but I cannot help it—it is the rule. Secondly, I think it has been established by a long series of authorities that we are to construe the will just as if there was no such rule of law as that of perpetuity or remoteness, and see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness. Construing it in that way I certainly do agree entirely with the Master of the Rolls in *Hale* v. *Hale* (3) that Vice-Chancellor *Malins* does construe this will contrary to what I should have thought was the obvious construction, and does so entirely by ignoring,—in all he says at least,—he may have had them present to his own mind—I cannot tell that,—the words which occasion the whole difficulty and doubt.

Taking that view of the matter I do not think it is necessary to go farther into the question than to say that I quite agree with what the Master of the Rolls said in *Hale* v. *Hale* (3); and taking that to be the construction of the will, and taking the rule as I have previously said to be established by authority, the only

(1) Law Rep. 5 Ch. Ap. 342. (2) Law Rep. 11 Eq. 499.
(3) 3 Ch. D. 643.

H. L. (E.) 1880 PEARKS v. MOSELEY.

doubt I can entertain as to the propriety of affirming this decision, and as a consequence affirming the decision in *Smith* v. *Smith* (1), is, what I said at the beginning, that I am not at all sure that I appreciate the grounds on which persons of such learning as the three Lords Justices of Appeal thought that that reasoning was not satisfactory.

LORD WATSON :—

My Lords, at the conclusion of the argument at the Bar, the main, I may say, the only, difficulty which I felt in this case arose from a suspicion that I had failed to appreciate the grounds of judgment assigned by the learned Vice-Chancellor, which received the warm approval, apparently, of the learned Judges of the Court of Appeal. But I have been very much relieved by the observations which have fallen from your Lordships, and I am constrained to believe that the error, if I may so call it, upon which that judgment of the Vice-Chancellor is based, arises, I will not say from his ignoring these very important words in *Joseph Moseley's* bequest " which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue at his, her, or their decease or deceases respectively," but at all events from his having failed to give their due and proper effect to these words.

My Lords, I am quite satisfied that according to the just construction of this will, the words must be read as part of the description in which they are imbedded, and that they do aptly express this qualification that no grandchild of the testator shall take who does not attain the age of twenty-one, or who dies before that period not leaving surviving issue of his body.

Now, that being the right construction of the will, as your Lordships have also held, I think that the legal principles applicable to the case are in themselves very clear, and not only so, but that they are principles established by a long, weighty, and consistent series of authorities.

My Lords, it would be a waste of the time of this House were I, after the full exposition of the law which has been given by your Lordships, to make any comment upon those cases. There-

(1) Law Rep. 5 Ch. Ap. 342.

fore I content myself with saying that I concur with your Lordships' views both as to the construction of this will and also as to the principles of law which must govern the case.

Mr. *Chitty*:—Before your Lordship puts the question, may I remind your Lordships that the parties agreed, as I stated in opening the case, that the costs in any event should come out of the fund.

THE LORD CHANCELLOR:—I had recalled that to mind, and purposed saying that under those circumstances the House will not make the usual order as to costs. The costs will come out of the estate.

Mr. *Chitty*:—Yes; the costs of both parties will come out of the fund, and they will be costs as between solicitor and client.

Judgment under appeal affirmed; and appeal dismissed; the costs to be provided for as agreed between the parties.

Lords' Journals, July 8, 1880.

Solicitor for Appellant: *Robert Wood.*
Solicitors for Respondents: *Crosse, Sons, & Riley.*

[HOUSE OF LORDS.]

H. L. (E.) 1880

May 27, 28; *July* 15.

THE ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES . . . . } APPELLANTS;

AND

JAMES ROWE . . . . . RESPONDENT.

Ecclesiastical Commissioners—Limitations—3 & 4 *Will.* 4, *c.* 27—3 & 4 *Vict. c.* 113.

An allotment under an Inclosure Act (described as 137 A) was made in respect of premises held by a person under lease from a dean, the property leased being that of the dean in right of his deanery. By the 29th section of 3 & 4 Will. 4, c. 27, a dean could recover possession of such land within the term of sixty years from the time when the right of action first accrued. By the 3 & 4 Vict. c. 113, deanery lands, after the death of any dean then in possession, passed to the Ecclesiastical Commissioners; and the 57th section of that statute declared that "the Ecclesiastical Commissioners shall for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies at Law and in Equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery, &c., in respect of which such profits and emoluments, &c., respectively are, by or under the provisions of this Act, to be paid or accrue to and be vested in the said Commissioners." Renewals of the original leases had been made, but the allotment 137 A was never referred to in them. It had been in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, and it was, in that way, held adversely to him. The dean died in 1854, and the Commissioners then came into possession, under the statute, of the property of the deanery. In 1877 the Commissioners brought an action to recover the allotment:—

Held (*diss.* LORD BLACKBURN), that under the words of the 57th section the Commissioners had the same time within which to enforce their claim to the property that the dean would have had under the 29th section of 3 & 4 Will. 4, c. 27. There is a legal continuity between the rights, powers, and remedies of the dean, and those of the Commissioners. His right of action was transferred to them by statute, and was not barred by the mere fact of the transfer.

Per LORD BLACKBURN:—There are no words in the 57th section of 3 & 4 Vict. c. 113, which, as to time, render the 29th section of 3 & 4 Will. 4, c. 27, applicable to the Commissioners.

APPEAL from a decision of the Court of Appeal which had reversed an order of Mr. Justice *Mellor*, made in an action of ejectment brought to try the right of the Appellants to a piece of land allotted to the predecessor of the Respondent under the authority of an Inclosure Act for the parish of *St. Asaph*.

In the year 1808 an Act was passed authorizing the inclosure of certain common lands in the parish of *St. Asaph*, in the county of *Flint*. Commissioners were appointed to execute the Act. The parcel of land now in question, known as 137 A, was in fact allotted in 1818, but the allotment was not formally completed nor the land inclosed till 1827, when an award was made in these terms: "To the representatives of *Robert Morris*, deceased, 137 A, 0*a*. 2*r*. 39*p*. . . . To the personal representatives of *Robert Morris*, late of *St. Asaph* aforesaid, innkeeper, deceased, assigned and allotted in right of the lease of the *George and Dragon* and other premises in *St. Asaph*, one allotment situate at *Waen Eithinog Common* aforesaid, No. 137 A, containing two roods and twenty-nine perches, bounded, &c."—describing the boundaries—"the ditches, mounds, and fences of which allotment on the south and west sides thereof shall for ever hereafter be maintained and kept in repair by and at the expense of the said representatives, or the owners of the said allotment for the time being." The *George and Dragon* premises were, prior to the passing of the Inclosure Act, the property of the then Dean of *St. Asaph*, and remained the property of the said dean until the 27th of April, 1854. He died on that day, having never claimed the allotment in question.

An original lease of these premises had been granted in 1812 to trustees for the next of kin of *Robert Morris* for twenty-one years, as from the 22nd of August, 1809. On the 1st of May, 1820, this lease was assigned to *Hugh Jones*, and on the 2nd of May, in consideration of its surrender, a new lease was granted, which was often afterwards renewed, without any surrender of the premises, the last renewal being on the 11th of April, 1848. In these renewals no notice was ever been taken of the allotment 137 A, but the representatives of the allottee sold it in 1821 to the predecessor of the present Respondent. In 1840 was passed the Act relating to "the Commissioners of Ecclesiastical Duties and Revenues" (3 & 4 Vict. c. 113), by the 50th section of which the separate estates of deaneries and canonries not suspended by that Act became vested in the Ecclesiastical Commissioners, who, by the 57th section, were, for the purpose of enforcing payment of profits, &c., "and of obtaining possession of all lands, tithes, and other hereditaments vested in or accruing to them, and of recovering the rents and profits thereof, to have and enjoy all rights,

H. L. (E.) 1880 ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

powers, and remedies at Law and in Equity which belonged, or belong, or would belong, or have belonged, to the holder of the deanery," &c. The freehold and reversion of the *George and Dragon* at that time formed part of the estates of the deanery, and belonged to Dr. *Luxmore*, the then dean. He died in 1854, when, by virtue of the statute, all the deanery property became vested (subject to existing leases) in the Ecclesiastical Commissioners. The Commissioners in 1859 purchased the then subsisting lease of the inn, and acquired possession thereof, but they did not obtain possession of the allotment 137 A, and it was to recover this allotment, held by the now Respondent, that in 1877 they commenced the present action.

The cause was tried before Mr. Justice *Mellor* without a jury on the 10th of May, 1878, and on the 16th of May his Lordship delivered judgment. He found that "the Defendant had possession of the allotment 137 A adversely to the title of the Plaintiffs, for upwards of twenty years, but not for sixty years, and that the Ecclesiastical Commissioners have, under the 3 & 4 Vict. c. 113, s. 57, the same right, during the same period, of obtaining possession of the allotment 137 A which the holder of the deanery would have had in respect of the same." He therefore gave judgment for the Plaintiffs. On appeal this judgment was reversed, the Lords Justices thinking that an action brought by the Commissioners fell within sect. 2 of the 3 & 4 Will. 4, c. 27, and that the time allowed by sect. 29 of that statute to the dean himself to bring an action, was not given to the Ecclesiastical Commissioners by the effect of the 57th section of the 3 & 4 Vict. c. 113 (1). This appeal was brought against that decision.

Mr. *Southgate*, Q.C., Mr. *McIntyre*, Q.C., and Mr. *Clement Higgins*, for the Appellants.

Sir *F. Herschell*, S.G., and Mr. *Morgan Lloyd*, Q.C., for the Respondents.

1880 *July* 15.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the question in this case relates to a small parcel of land in *Flintshire*, which by an award under an *Inclosure Act*,

(1) 4 Q. B. D. 63.

completed in 1827, was allotted to the representatives of a then deceased lessee named *Morris*, who held under the Dean of *St. Asaph*, in right of his lease. The right to the leasehold property, called the "*George and Dragon*," in respect of which this allotment was made, had previously (viz. in 1820) become vested, by assignment from the representatives of *Morris*, in one *Hugh Jones*; and I entertain no doubt that the title under the award became vested by virtue of the Inclosure Acts in *Hugh Jones* for the term of his lease, with a reversion in fee to the Dean of *St. Asaph* in his corporate character.

The lease had been renewed by the dean to *Hugh Jones* in 1820 for twenty-one years from the 2nd of November, 1819. In 1828 it was again renewed to an assignee of *Hugh Jones* by Dr. *Luxmoore*, then dean, for another like term; and there were farther successive renewals, by the same dean, in 1834, 1842, and 1848. Each of these renewals was expressed to be granted in consideration of the surrender of the former lease.

By the Act passed in 1840 for the better regulation of cathedral and collegiate churches and their revenues (3 & 4 Vict. c. 113), all the separate estates held by deans in right of their deaneries were (subject to the interests of the then existing deans) transferred to the Ecclesiastical Commissioners. Dean *Luxmoore* died in 1854, and all the separate estates of the deanery of *St. Asaph* then vested absolutely (subject to any subsisting leases) in the Commissioners.

The parcel of land in question does not appear to have been in the possession of the dean, or of any of his lessees, or of any one claiming by underlease or otherwise from or through him or them, at any time after the date of the award in 1827. The Respondent, who was in possession of it when the action was brought, out of which this appeal has arisen, derived his title from one *Sarah Moulton*, by whose devisees in trust it was conveyed to a person through whom he claims in 1854; it being recited in that deed of conveyance that *Sarah Moulton* purchased this land from the representatives of *Morris* in 1821, but took from them no conveyance; and that she remained in the undisturbed possession of it up to the time of her death in January, 1854. The representatives of *Morris* had no right, in 1821 or afterwards, to sell or

H. L. (E.) 1880

ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

Lord Selborne, L.C.

convey it, and *Sarah Moulton's* possession must, upon the evidence before your Lordships, be regarded as having been from the first without any title.

The Commissioners brought no action till August, 1877. They had in December, 1859, bought up the lease of the "*George and Dragon*," and thus became entitled in fee simple in possession to all the premises included in the lease of 1848. The action was tried before Mr. Justice *Mellor* in March, 1878, without a jury; the only question which it is now material to consider being, whether the title of the Commissioners was, or was not, barred by the *Statute of Limitations*, 3 & 4 Will. 4, c. 27. The learned Judge found that the Defendant had possession, adverse to the title of the Plaintiffs, for upwards of twenty years, but not for sixty years; and being of opinion that the Commissioners had, under 3 & 4 Vict. c. 113, s. 57, "the same right, during the same period, of obtaining possession which the holder of the deanery of *St. Asaph* would have had in respect of the same," he found his verdict, and gave judgment, for the Plaintiffs. That judgment was reversed on appeal, and the present appeal to your Lordships is from the judgment of reversal.

In the argument at your Lordships' Bar, it was insisted that no right of action had accrued to the Ecclesiastical Commissioners, or to any person through whom they claim, more than twenty years before the action was brought. I will therefore first consider how the case would stand if not affected by the 57th section of 3 & 4 Vict. c. 113.

By sect. 2 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), the right of any person to bring an action to recover land is barred by the lapse of twenty years next after the time at which the right to bring it shall have first accrued "to some person through whom he claims;" or if such right shall not have accrued to any person through whom he claims, then within twenty years after the time when such right shall have first accrued to the person bringing the action. Under the definitions of the preceding section the word "person" extends to a body politic, corporate, or collegiate, and therefore to the Ecclesiastical Commissioners, unless a later section (the 29th) (which provides specially for the case of spiritual and eleemosynary corporations sole), can be shewn to be applicable.

The 3rd section of the same Act provides that the right to bring an action to recover an estate or interest which was reversionary at the time when the possession sought to be displaced began, "shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;" and the 5th section, providing farther as to such reversionary estates, adds the words: "when the same shall have become an estate or interest in possession, by the determination of any estate or estates, in respect of which such land shall have been held, or the profits thereof shall have been received."

The Ecclesiastical Commissioners have now the same title which was formerly vested in the dean, by virtue of the transfer made to them by 3 & 4 Vict. c. 113, and I did not understand it to be disputed at the Bar that they claim through the dean within the meaning of those words as used in the *Statute of Limitations*. If no right of action had accrued to the dean before 1854, when Dean *Luxmoore* died, the Appellants ought to succeed, for the lease which was current in 1854 was not surrendered till 1859, and the action was brought within twenty years from that time. But I am of opinion that a right of action did, before 1854, accrue to the dean, and that this right accrued not later than the earliest grant of a lease by way of renewal which was made by the dean after the commencement of the possession of *Sarah Moulton*. The evidence before the House shews that, although no strict proof was given of the time when that possession first began, there was no real controversy upon the subject; and, looking to the state of that evidence, and to the verdict found by the learned Judge who tried the case, I think your Lordships will not do wrong if you assume, for this purpose, that the recitals in the deed of conveyance from *Sarah Moulton's* representatives, dated the 30th of September, 1854, were taken between the parties as correct.

If so, her possession commenced during the currency of the lease granted by the dean to *Hugh Jones* on the 2nd of May, 1820, which lease continued to subsist until the 18th of June, 1828, when it was surrendered contemporaneously with and in consideration of the grant of the new lease of that date. On that surrender, a right of action to recover the premises of which *Sarah Moulton* was then in possession accrued to the dean, and

H. L. (E.) 1880

ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

Lord Selborne, L.C.

all the new leasehold interests then and on each subsequent renewal created were, in my opinion, derived from and out of the estate in possession, which then became vested in the dean. That surrender, although not effected by a separate instrument, must, in my opinion, be deemed to have preceded the new grant; and I cannot assent to the argument addressed to your Lordships by the Appellant's counsel, that the effect of a renewal contemporaneous with a surrender, is, to prevent the accruer of a right of action to the lessor by the surrender of the former lease against a *disseisor* or trespasser; an argument which seems to me inconsistent with the provisions as to reversionary estates contained in the 3rd and 5th sections of the *Statute of Limitations*, and which if well founded, would prevent that statute from ever running in favour of any length of possession whatever against a title to church leaseholds renewed from time to time in the manner which was formerly customary, and of which an example is found in this case.

The result, it is to be observed, would be practically the same, if *Sarah Moulton's* possession had commenced during the currency of any of the other leases prior to the last surrender and renewal on the 11th of April, 1848.

The case of *Corpus Christi College* v. *Rogers* (1), recently decided by the Court of Appeal (then composed of Lord *Coleridge* and Lords Justices *Bramwell* and *Brett*), was relied upon at the Bar, as an authority for the proposition that in a case of this kind, when there is either a surrender by operation of law on the acceptance of a new lease, or a surrender and the grant of a new lease by one and the same deed, a right of action does not accrue for want of an "appreciable moment of time between the grant and the surrender." I am not sure that I entirely understand the view which was taken on the occasion by Lord Justice *Bramwell;* but the judgment of Lord *Coleridge* appears to me to have proceeded upon the particular facts of that case, which were altogether different from the present. The *Statute of Limitations* was then set up against the college, the superior landlord, not by a trespasser or *disseisor,* but by an under-tenant of the lessee, to whom the land in question had been let by the lessee in 1818 under a written agreement for a yearly tenancy at 7*s.* 6*d.*

(1) 49 L. J. (Ex.) 4.

a year. This under-tenant regularly paid his rent to the lessee till 1853, and the lease, which was current when the rent was last paid, was renewed by the college to the lessee in 1857, four years afterwards. By the statute 4 Geo. 2, c. 28, s. 6, it is provided that on a surrender by a lessee, and grant of a new lease, the under-lessees shall hold and enjoy as if the original leases out of which the respective under-leases are derived, had been still kept on foot and continued. When this renewal in 1857 took place nothing had been done, notwithstanding the four years' arrear of rent, to put an end to the tenancy of the under-lessee by notice to quit or otherwise; and the college, whose tenant he was not, and to whom his possession was not adverse, had (as I conceive) no right of action against him. The lease which was surrendered on the renewal of 1857 would have continued (if there had been no renewal) till 1870; the renewed lease itself continued till 1877; and the college brought its action in 1878. The section of the *Statute of Limitations* which the under-tenant relied upon was not, as in this case, the 2nd, read in connection with the 3rd and 5th, but was the 8th, namely, that applicable to tenancies from year to year, when the rent has for twenty years remained unpaid. The case, therefore, of *Corpus Christi College* v. *Rogers* (1) is, in my opinion, no authority for the proposition which it was cited to establish.

It remains to consider the effect of the 57th section of the Act 3 & 4 Vict. c. 113. On this point I was disposed, during the argument, to concur in the view of the Court of Appeal; but farther consideration has now brought me to an opposite conclusion.

By the 29th section of the *Statute of Limitations*, the time allowed to an ecclesiastical corporation sole to recover land is "the period" (commencing from the time when the right to bring an action first accrued) "during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years, taken together, shall amount to the full period of sixty years; and if such times, taken together, shall not amount to the full period of sixty years, then during such

(1) 49 L. J. (Ex.) 4.

H. L. (E.) 1880

ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

Lord Selborne, L.C.

farther number of years, in addition to such six years, as will, with the time of the holding of such two persons, and such six years, make up the full period of sixty years."

By the 57th section of the 3 & 4 Vict. c. 113, it is provided that the Ecclesiastical Commissioners "shall, for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them" (under the Act) "and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies, at Law and in Equity, which belonged or belong, or would belong or have belonged, to the holder of the deanery, canonry, prebend, dignity, or office, or the rector of the rectory, in respect of which such profits and emoluments, lands, tithes, and other hereditaments and endowments respectively, are by or under the provisions of this Act to be paid to and be vested in the Commissioners." The question is whether the effect of that section is to make the 29th and not the 2nd section of the *Statute of Limitations* applicable, under the circumstances of this case, in favour of the Commissioners?

The Court of Appeal thought that "a decision on this point, in favour of the plaintiffs, would lead to this result, that the Commissioners could *always* bring an action to recover land vested in them under the 3 & 4 Vict. c. 133, s. 50, *even that of which they at one time had possession*, at any time within sixty years from the time when the right to do so first accrued." I do not think that a decision in favour of the Plaintiffs would lead to any such result: such a consequence is certainly not, in my opinion, deducible from the language of the 57th section of the 3 & 4 Vict. c. 113; and it cannot reasonably be supposed to have been within the contemplation of the Legislature.

The principle of the 29th section of the *Statute of Limitations* was to prevent the negligence of one or two particular incumbents, each of whom would be in substance a mere tenant for life, from becoming a bar to the rights of their successors. That principle could have no permanent application after the transfer of the title to a corporation aggregate, in which there is no such succession, and to which the Legislature has thought fit in all other cases to apply the shorter term of limitation. To measure the

period of limitation for all time by reference to the succession of incumbents in an office, the incumbents of which had ceased to have any title to or interest in the property in question, would be (to say the least) arbitrary and capricious: and the literal application of any such rule of succession to some of the cases comprehended within the general terms of the 57th section of the 3 & 4 Vict. c. 113, *e.g.*, to the canonries suspended and the sinecure rectories suppressed under the 4th, 8th, 9th, 10th, 11th, 14th, 19th, 48th, 49th, and 54th sections of that Act, would be impossible; though I am not satisfied that such cases might not, if time had begun to run against the last canon or rector, be treated as falling within the sixty years limit, applicable when the times of two incumbencies, and six years added, do not amount to the full period of sixty years. The expressed object of the section was to effectuate the transfer by establishing a legal continuity between the rights, powers, and remedies, of the Commissioners and those of the former corporation sole; not to regulate the manner in which the Commissioners should enjoy them, after they had obtained the full benefit of the transfer.

If, therefore, the question had been as to the time allowed to the Ecclesiastical Commissioners to recover lands, formerly the separate estate of a dean, of which they had once obtained possession subsequently to the vesting of their title under 3 & 4 Vict. c. 113, and had been afterwards dispossessed, I should have been of opinion that the case was governed by the 2nd section of the *Statute of Limitations*, and that the action must be brought within twenty years. The right of action would in that case have first accrued, not to their predecessor in title, but to the Commissioners themselves. It would not have been a right of action transferred to them by the statute.

But the present case is different. The right of action now in question first accrued, not to the Commissioners, but to the ecclesiastical corporation sole through whom they claim: and if my view of the facts is correct, it had accrued more than twenty years before the title, transferred to the Commissioners by 3 & 4 Vict. c. 113, became vested in possession. The action was brought to obtain that possession, "*for the purpose of obtaining*" which the 57th section of that statute said they should

H. L. (E.) 1880 ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE. Lord Selborne, L.C.

"have and enjoy *all rights, powers, and remedies, at Law and in Equity, which belonged or would belong, or have belonged* to the holder of the deanery." The right of action which then belonged to the dean, and the remedy founded upon it which the dean would have had, were, for this purpose, expressly transferred by the statute to the Commissioners; who were to *have and enjoy* them as they would have been had and enjoyed by the dean. How can this be possible if a right and a remedy which were not barred, and would not have been barred, as against the dean, are held to have become barred, under the *Statute of Limitations*, by the mere fact of the transfer? The decision of the Court of Appeal seems to me to contradict and nullify the express words and the manifest intent of the 57th section. The section says "*all rights and remedies*," the decision says (not in words, but in effect), "*all rights and remedies except* those which would have been barred by any Statute of Limitations if, at the time when any right of action first accrued, the land had been vested in the Commissioners and not in the dean."

On the other hand, complete effect is given to the words, and also (as it seems to me) to the intent of the section, by holding, with Mr. Justice *Mellor*, that the right and remedy, which the dean would otherwise have had, were, by that section, preserved and kept alive *for the purpose of enabling the Commissioners to obtain possession of the land transferred to them;* and that, until such possession was obtained, such right and remedy could not be barred against the Commissioners by any lapse of time which would not have barred them against the dean. Until that time the transferred right of action would have continued to belong to the dean if there had been no transfer; and the 57th section says, "all rights," &c., "which belonged, or *would belong*, or *have belonged*" to the dean.

This conclusion is also in accordance with the reason and principle of the 29th section of the *Statute of Limitations*; which is as much applicable to the succession of the Commissioners to a dean, during whose life-incumbency the statute had begun to run, as it would have been to the succession of dean to dean. No special provision being made for the case of the succession of the commissioners at the end of the first, rather than of the second

incumbency after the right of action accrued, the rule must, in both these cases, be the same; and that rule can be applied, without practical difficulty, when the succession of the corporation sole continues, though it has ceased to be entitled to the property in question. The Legislature might, of course, have provided that, in such a case, the time allowed to the Commissioners to bring an action should not exceed twenty years from the date at which their own title became vested in possession. But it has not done so; and, if it had done so, the right would not have been barred in this case. It is only when "such right shall *not* have accrued to any person through whom he claims" that the 2nd section of the *Statute of Limitations* authorizes the computation to be made from the time at which the right shall have first accrued to the person bringing the action.

I am, for these reasons, of opinion that the judgment under appeal is erroneous, and ought to be reversed.

With regard to costs, it will follow, as a matter of course, that the judgment of Mr. Justice *Mellor* will be restored, and that the Respondent will be ordered to pay the costs of the appeal to the Court of Appeal. But, looking to the nature of the case, and to the larger question which the Commissioners were more anxious to have settled in their favour, and on which your Lordships have been unable to adopt their view, and also looking to the position and character of the Commissioners as a public body, I think your Lordships will do right if, in the exercise of your discretion, you give no costs of the appeal to this House.

LORD BLACKBURN:—

My Lords, I also think that before the passing of the 3 & 4 Vict. c. 113, the Dean of *St. Asaph* had a right of action to recover this land, which first accrued on the determination of the lease current at the time when the allotment was made. I so completely agree with the view of the facts and the reasons of the Lord Chancellor on this part of the case, and in his observations on the case of *Corpus Christi College* v. *Rogers* (1), that I shall say no more about them. It may be doubtful whether the allotment was made during the currency of the lease of 1812, which was

(1) 49 L. J. (Ex.) 4.

H. L. (E.)
1880
ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES
v.
ROWE.
Lord Blackburn.

surrendered and renewed in 1820; or during the currency of the lease of 1820, which was surrendered and renewed in 1828; but it is not material which was the date, for this action was commenced in 1877, and the earliest of those dates is less than sixty years, and the latest is more than twenty years before 1877.

But the question which on this view of the facts has to be decided is one of great difficulty. It depends upon the construction of the 57th section of the Act 3 & 4 Vict. c. 113. The language used is such as irresistibly to lead me to the conclusion that the draftsman who framed the section did not, at the moment, recollect that a longer period was needed to be a bar to the right of action of an ecclesiastical corporation sole than would be a bar to the right of action of a corporation aggregate, such as of the Ecclesiastical Commissioners, or he would have used words plainly applicable to the case. He seems to have had in his mind the very artificial doctrine illustrated by *Webb* v. *Russell* (1), and to have used language adapted to meet the difficulties which might arise on that account.

But though I agree with Lord Justice *Cotton* that probably the attention of Parliament was never directed to the point, and that there was in one sense no intention either way, yet we must determine what is the intention indicated, following the usual rules of construction, by the words used. The mere statement of the question to be decided shews it to be one of difficulty. When I add that Mr. Justice *Mellor* thought that the effect of sect. 57 was that the Ecclesiastical Commissioners have the same right, *during the same period*, of obtaining possession which the holder of the deanery would have had in respect of the same, and that the Court of Appeal thought that the question was whether there was enough to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in sect. 2 of the 3 & 4 Will. 4, c. 27, and that there was not enough; and that at the close of the argument I believe all the noble and learned Lords who heard the arguments were disposed to concur in that view, though on farther consideration the Lord Chancellor has changed his opinion, I think I may say it is one of great difficulty.

At the close of the argument I was something more than dis-

(1) 3 T. R. 393.

posed to affirm the judgment. I was influenced, in part, by thinking that the construction of the 57th section, for which the Appellants contend, would necessarily produce effects which it was impossible the Legislature could have intended. The reasoning of the Lord Chancellor has shaken that view very much, and the consequence is, that what was then a decided opinion that the judgment below was right, is now an opinion that on a very difficult question the balance of argument is in favour of the view taken by the Court of Appeal.

My Lords, I do not think anything turns on the precise words of the *Statute of Limitations*. I think that had the 49th section of the 3 & 4 Vict. c. 113, by which all the estates and interest of the dean were, without any conveyance or assurance in the law other than the provisions of this Act, to "accrue to and be vested absolutely in the Ecclesiastical Commissioners," stood alone, it would have been clear that the Ecclesiastical Commissioners, having the estate vested in them, had the right of action to recover it; and also that they were persons claiming by, through, or under the ecclesiastical corporation sole whose interest was vested in them, and that consequently their right of action must in this case be deemed to have accrued more than twenty years before the commencement of this action. And as the Ecclesiastical Commissioners are persons within the definition of the *Statute of Limitations*, the 2nd section of that Act would be a bar to that action. But sect. 29 is in effect an exception from sect. 2, and gives an ecclesiastical corporation sole a larger period; that during which two persons in succession shall have held the benefice and six years, or sixty years, whichever is the longer period.

I think it could not be successfully maintained that the Ecclesiastical Commissioners, who are not an ecclesiastical corporation sole, could, merely because they claim through an ecclesiastical corporation sole, bring themselves within either the letter or the spirit of that section. And if, therefore, sect. 49 of 3 & 4 Vict. c. 113, had stood alone, the consequence would have been that the Respondent who had, just before the passing of the 3 & 4 Vict. c. 113, an estate by wrong, which required some years after the death of the successor of the Dean *Luxmoore*, (the dean in whose time the cause of action accrued,) to become indefeasible, would

H. L. (E.) 1880

ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

Lord Blackburn.

on his death have, by an unintended effect of the statute, become an indefeasible estate.

And, if this had been thought of, it would have been very just to enact that when a right of action to recover lands had first accrued during the time when the ecclesiastical corporation sole was entitled to the lands, the Ecclesiastical Commissioners should have had some specific, I do not say what, period after the lands vested in them, during which to bring their action. But this is not said in terms in sect. 57. No such words as "when the right of action has first accrued in the time of the ecclesiastical corporation sole" are to be found in the 57th section; and the reasoning of the Court of Appeal was, in part, founded on this, that if the general words in sect. 57, that the same right, &c., which "belonged or belong, or would belong or have belonged" to the ecclesiastical corporation sole, meant the same right *for the same period*, it would necessarily follow that the Ecclesiastical Commissioners would have this extended period of sixty years, even though the right of action had accrued after the lands had vested in the Ecclesiastical Commissioners. And this, as I understood the argument of counsel, was what the Ecclesiastical Commissioners contended, and what they brought the appeal to establish.

The value of this small allotment was not such as to have been worth appealing about; and now that forty years have elapsed since the 3 & 4 Vict. c. 113, the value of the property which would be affected by a decision in their favour on the more limited ground now put forward, cannot be very large. But a decision that they should have for all time in respect of all lands which had been the property of an ecclesiastical corporation sole, the same period within which to bring their actions as that within which the ecclesiastical corporation sole, if it had continued proprietor of the lands, might have brought this action, would have been of great value. I then thought if their argument was well founded, that if the words relied on were sufficient to enable them to recover this allotment (the right of action as to which accrued in Dean *Luxmoore's* time), it must follow that they could recover lands formerly belonging to the deanery at any time within two incumbencies, and six years or sixty years after the right of action accrued, whenever that right of action accrued. And being con-

vinced that such a result could never have been contemplated by the Legislature, and that there was no machinery for working out such a result in several cases, I thought this a *reductio ad absurdum*. And thinking this I was much confirmed in thinking that the Court of Appeal put a right construction on the statute.

The Lord Chancellor has pointed out what had escaped my notice, that the words "for the purpose of obtaining possession of such lands" override the whole of sect. 57, and that the effect of those words may be to prevent the result from following which, as I understand, he thinks (as well as I) would be a *reductio ad absurdum*. I think there is great force in this observation, and consequently I am by no means so confident on the structure of the statute as I was. But I still think that the Lords Justices of Appeal were right in thinking that the combined effect of sect. 50 of 3 & 4 Vict. c. 113, and the 2nd section of the 3 & 4 Will. 4, c. 27, would be to bar the Appellants, and that the question is whether there is enough in the 57th section to prevent the action being barred. I have already said that I think that the point cannot have been thought of when the clause was framed, and that consequently the question is whether the language used is such as to express that the action should not be barred as it otherwise would have been.

The words are that the Appellants, for the purpose of obtaining possession of all the lands formerly vested in the dean and transferred to them by the Act, "shall have and enjoy all rights, powers, and remedies at Law and in Equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery." I cannot bring myself to the conclusion that these are equivalent in effect to the words that they should have the same rights and the *same period within which to exercise these rights*, and, as it seems to me, words to that effect were required to prevent the Ecclesiastical Commissioners being barred by sect. 2 of 3 & 4 Will. 4, c. 27. I cannot, therefore, agree that the decision of the Court of Appeal is either counter to the manifest intent or the express words of the statute, and, though with more doubt than I had entertained at the close of the argument, I still think that the judgment should be affirmed.

H. L. (E.) 1879

ECCLESIASTICAL COMMISSIONERS OF ENGLAND AND WALES v. ROWE.

I agree with the Lord Chancellor that if reversed, it is a case in which there should be no costs of the appeal in this House.

LORD WATSON :—

My Lords, I agree with your Lordships in holding that a right of action for recovery of the parcel of land in dispute accrued to Dr. *Luxmoore*, the late Dean of *St Asaph*, less than sixty but more than twenty years before the institution of the present suit in 1877.

The second question in this case—the question whether the limitation pleadable by the Respondent in bar of the Appellants' right of action, is that established by sect. 2, or that established by sect. 29, of the *Statute of Limitations*,—has all along appeared to me to be attended with great difficulty. It depends for its solution upon the construction of sect. 57 of the Act 3 & 4 Vict. c. 113, which is the basis of the Appellants' contention, that the action at their instance is not barred by the lapse of twenty years after the accrual of the right of recovery.

In the argument addressed to us from the Bar upon the import and effect of sect. 57, the only alternatives suggested were these, that in suits relative to ecclesiastical property vested in them by the Act 3 & 4 Vict. c. 113, the Commissioners were to have the benefit of sect. 29 of the *Statute of Limitations* either in perpetuity or not at all.

It appears to me that the favourable limitation established by sect. 29 was an inherent quality of the right of recovery which belonged to the holding of the deanery; and I should be of opinion that the language of sect. 57 of the Act of 3 & 4 Vict. was sufficient to transfer the right, with that quality in perpetuity, to the Commissioners, were it not that there are various considerations arising from the character of the limitation, and from the context of the statute, which render it very improbable that such can have been the intention of the Legislature. But I had difficulty in giving their due weight to these considerations, because I was satisfied that it was the intention of the Legislature to transfer to the Commissioners the whole ecclesiastical property which the late dean either had in possession or was entitled to recover. I

could not conceive that it was the intention of the Legislature, because it was making a transfer to statutory commissioners, to make a gift of any portion of that property to trespassers who would not have been in a position to plead the *Statute of Limitations* against the dean or his successor. And I hesitate to adopt the view that an oversight had been committed by its framers which would have the effect of frustrating, in some if not in many cases, one of the leading purposes of the Act.

I have now had an opportunity of perusing and considering the opinion of the noble and learned Lord on the woolsack, and I agree with it in every point. It affords a satisfactory solution of the difficulties which I experienced in considering this case; and I shall not detract from the force of the noble Lord's reasoning by adding any argument of mine.

Judgment appealed from reversed. Judgment of Mr. Justice Mellor restored. Respondents to pay the costs of the appeal to the Court of Appeal. No costs of the appeal to this House.

Lords' Journals, 15th July, 1880.

Solicitors for Appellants: *Jennings, White, & Buckston.*

Solicitors for Respondents: *Field, Roscoe, Field, Francis & Osbaldiston.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1880 June 14.

STEELE AND OTHERS . . . . . APPELLANTS.
M'KINLAY . . . . . RESPONDENT.

Bill of Exchange—Acceptance—Indorsement—Collateral Obligation—Statutes 19 & 20 *Vict. c.* 60, *ss.* 6, 11; 19 & 20 *Vict. c.* 97, *s.* 6; *and* 41 *Vict. c.* 13, *s.* 1.

7 QBD 635-9, 640
11 QBD. 91
8 App. Ca. 734, 748

Sect. 11 of the *Mercantile Law Amendment (Scotland) Act*, 1856, is in the same terms with sect. 6 of the corresponding English Act: and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorized by him."

On the 2nd of March, 1878, in *Hindlaugh* v. *Blakey* (3 C. P. D. 136), it was held that an acceptance by the drawee was null in respect that there was no writing except the signature.

On the 16th of April, 1878, was passed the *Bills of Exchange Act*, which, after reciting the above quoted section of the Mercantile Law Amendment Acts; and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not, and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill."

A. procured from *B.* an advance of £1000 on a bill of exchange at twelve months for *C.* and *D.*, his two sons. *B.* signed the bill as drawer, and addressing it to *C.* and *D.*, handed it to *A.*, who forwarded it to *C.* and *D.* They signed it as acceptors, and sent it back to *A.*, who wrote his own name across the back, and gave it to *B.* He then forwarded the amount to *C.* and *D.*

Subsequently *C.* and *D.* became bankrupt, and were unable to pay the amount of the bill. *A.* and *B.* being both dead, there was no exact evidence why *A.* put his name on the bill. *C.* and *D.* had previous to the date of the bill obtained money from *B.* on their own security. The trustees of *B.* claimed from *A.*'s representative the amount of the bill on the ground that *A.* indorsed the bill as "joint obligant" with *C.* and *D.*, "and as co-acceptor with them for payment of its contents":—

Held, affirming the decision of the Court below, although not upon the same reasons, that *A.*'s representative was not liable, because that *A.* was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word; and that his liability, as insisted upon by *B.*'s trustees, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law merchant would infer from his mere signature as it appears on the back of the bill, could only be proved by a writing properly signed under, in *Scotland*, the 6th section of 19 & 20 Vict.

c. 60; and in *England* the 29 Car. 2, c. 3, s. 4, which writing was here absent.

Held, also, that the Act of 1878 was in effect a declaration by the Legislature that the decision in the case of *Hindlaugh* v. *Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the *Scottish Act* between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded.

Per LORD WATSON:—The character in which *A.* did become a party to the bill was both in fact and law that of an indorser; and in determining his legal position, the fact that his indorsement was written before the bill was delivered to the drawer, and the money advanced by him, was quite immaterial.

The doctrine deduced from *Don* v. *Watt* (26 May, 1812, F. C. vol. xvi.; 647) and *Watters* (7 March, 1818, F. C. vol. xix.; 489), by Professor *Bell* in his Commentaries, vol. i. (7th ed.), p. 425, that in *Scotland* a signature as an acceptor by a person not a drawee "is held to import a joint undertaking as acceptor of the bill or maker of the note" not approved of: see Lord *Watson's* opinion at p. 779.

Matthews v. *Bloxsome*, 1864 (33 L. J. (Q.B.) 209) doubted as sound law.

Macdonald v. *Union Bank of Scotland* (Court Sess. Cas. 3rd Series, vol. ii. p. 963) approved.

APPEAL from the Court of Session, *Scotland*.

In 1874, *William* and *Thomas M'Kinlay* commenced business as timber-merchants at *Strabane, Ireland*, under the name of *W. & T. M'Kinlay*. Requiring funds, they commissioned their father, the late *James M'Kinlay*, horse-dealer in *Glasgow*, to obtain them an advance of £1000. He entered into communication with *John E. Walker*, coach proprietor in *Glasgow*, the result being that Mr. *Walker* signed as drawer a bill bearing date the 25th of May, 1874, for £1000 at twelve months, addressed to "Messrs. *Wm. & Thos. M'Kinlay*, wood-merchants, *Strabane*," which he handed to *James M'Kinlay*. The latter sent it to his sons in *Ireland*, who returned it duly accepted in their firm's name. *James M'Kinlay* then wrote his own signature across the back of the bill, and handed it to Mr. *Walker*, who remitted its amount, less discount, to the drawees. In March, 1875, Mr. *Walker* discounted the bill with the *National Bank of Scotland*, but *W. & T. M'Kinlay* failing to pay it when due, he retired it.

James M'Kinlay died in September, 1874, and his representative is the Respondent *Alexander M'Kinlay*. *J. E. Walker* died in

11 S.C. (H.L.) 998

H. L. (Sc.) 1880 STEELE v. M'KINLAY.

September, 1875, and the Appellants are his trustees. Several questions arose between the parties in *Scotland*, and there was an action and a counter-action, which were heard together. But the sole question in this appeal was whether the Appellants, the trustees, could recover from the Respondent, as representing his father, the sum of £1000, the amount of the bill of exchange.

The bill of exchange was in the following form:

"Stamp 10*s*. "Due 28th May, 1875.

"£1000 stg.

"*Glasgow*, 25th May, 1874.

"Twelve months after date pay to me or my order at the *National Bank of Scotland's* office, *Queen Street, Glasgow*, the sum of one thousand pounds sterling, value received.

"*John E. Walker*,
"*W. & T. M'Kinlay.*

"To Messrs. *William & Thomas M'Kinlay*,
"Wood merchants, *Strabane*."

The bill was indorsed on back as follows:—

"*James M'Kinlay*,
"*John E. Walker*."

Owing to the death of *James M'Kinlay* and *J. E. Walker* it was not known exactly for what purpose *James M'Kinlay* put his name on the back of the bill.

The Appellants averred *inter alia*:

That *James M'Kinlay* had frequent business transactions with Mr. *Walker*, and had induced him during the year 1874 to make considerable advances to his sons *William* and *Thomas M'Kinlay*. . . .

(Cond. 3.) These advances amounted in all at the time of Mr. *Walker's* death, on the 2nd of September, 1875, to £3784 13*s*. 4*d*., exclusive of interest, and were, to the extent of £3676 3*s*. 6*d*., constituted by six acceptances of *W. & T. M'Kinlay* to *Walker*.

(Cond. 4.) One of these bills was dated 25th May, 1874, and was drawn by Mr. *Walker* upon, and accepted by, *W. & T. M'Kinlay* for £1000, and was payable twelve months after date. It was indorsed by *James M'Kinlay*. He so indorsed it as joint obligant with the acceptors, and co-acceptor with them for payment of its contents.

On the other hand, the Respondent stated *inter alia*:

The late *James M'Kinlay* carried on a large business as a horse dealer in *Glasgow*, and he also, under the firm name of *James M'Kinlay & Son*, carried on the business of a timber merchant at *Strabane*, in the north of *Ireland*. These

businesses were entirely separate from each other. The Defender for many years before his father's death managed and conducted his Scotch business as a horse dealer, and the Defender's brothers *William* and *Thomas* had the management of the Irish business.

(Stat. 2.) Sometime before his death the Defender's father transferred his business property and effects in *Ireland* to Defender's brothers, *W. & T. M'Kinlay;* and the *Glasgow* business and property to the Defender, burdened with certain provisions, *inter alia* that of paying his debts.

(Stat. 4.) After they had acquired the Irish business the said *W. & T. M'Kinlay* made large additions to their works, and as they required an extra supply of money therefor, they arranged to get a loan of £1000, and on the 25th day of May, 1874, they adhibited their names of the document founded on, which then contained the whole writing now on the face thereof, except the subscription "*J. E. Walker*," but contained no writing on the back. The said document was delivered by *W. & T. M'Kinlay* to their father *James M'Kinlay* for the purpose of his filling up as drawer, and advancing to them the said sum of £1000. The said *J. E. Walker* was not known in the transaction to the said *W. & T. M'Kinlay*, and it was not until their father's death that they learned that the name of Mr. *Walker* had been inserted in the bill as drawer.

(Stat. 5.) The Defender (Respondent) is not aware, and cannot tell, how the name of *James M'Kinlay* came to be written on the back of the said document; and he does not admit, and does not believe that it was put there by him as acceptor. . . .

(Stat. 6.) The said *W. & T. M'Kinlay*, were afterwards requiring further advances, and in the end of the year 1874, when on a visit to *Glasgow* to make arrangements for obtaining more money, they learned for the first time that the name of Mr. *Walker* had been filled in on the said bill as drawer, and they entered into arrangements with Mr. *Walker* to get further advances, on condition of their giving him certain securities over their property in *Ireland*, covering the £1000, and the other advances which might be made by him. The said securities consisted of a mortgage over certain of the property and effects in *Ireland* belonging to the said *W. & T. M'Kinlay*.

(Stat. 7.) The mortgage is dated the 3rd of February, 1875, and it is therein stipulated "that whereas Mr. *Walker* had agreed to lend to the said firm of *W. & T. M'Kinlay* the sum of £5000, on having the repayment thereof secured to him in manner" therein mentioned, and that in pursuance of the said agreement, and in consideration of the receipt of the said £5000, which is hereby acknowledged, and of the other considerations therein mentioned, and *inter alia*, the delay mentioned in stat. 8, the said *W. & T. M'Kinlay* granted the said mortgage, and demised the subjects therein mentioned to Mr. *Walker*. The £1000 is included in the said £5000.

(Stat. 8.) By the mortgage *W. & T. M'Kinlay* bound themselves that, on the 3rd of May, 1875, they should pay to Mr. *Walker* the sum of £5000 with interest, and if the said sum of £5000 should not be paid to them, that they by half-yearly payments on the 3rd of August and the 3rd of February in every year, should pay interest on the sum, or so much thereof as still remained owing. If default was made in the said payment it was therein provided that the said *J. E. Walker* should have power to enter into possession and draw the rents and sell the subjects mortgaged. . . .

H. L. (Sc.)
1880
STEELE
v.
M'KINLAY.

(Stat. 9.) Before the date of the document founded on, Mr. *Walker* had made further advances to the said *W. & T. M'Kinlay* amounting to £2672, or thereby, in addition to the £1000. By Mr. *Walker* accepting the mortgage under the circumstances, there was effected a novation of the said debt of £1000, if any debt was constituted by the document containing it, and any liability attaching to the Defender was discharged.

(Stat. 11.) The said *J. E. Walker* died in September, 1875, but previous to his death he gave no notice requiring payment in terms of the said mortgage, and the Pursuers did not give any such notice until the 11th of October, 1876. . . .

(Stat. 12.) On the 28th of May, 1875, Mr. *Walker*, both through his clerk and his agents, and by means of his brothers, endeavoured to get from the Defender a separate acknowledgment for the said £1000, but the Defender refused to grant the same, as he did not consider himself liable therefor; but he admitted both verbally and in writing that he undertook to pay his father's debts so far as they referred to the Scotch business.

In the proof allowed, *William M'Kinlay* said that his firm intended to obtain money on the security of a mortgage, his father promising to arrange the loan. The bill he signed as a preliminary transaction. His father got the bill, but it was not intended that he should be liable for it. Mr. *Walker's* bookkeeper, Mr. *Black*, said he drew out the bill on Mr. *Walker's* instructions, but never saw *James M'Kinlay* in connection with it. He saw Mr. *James M'Kinlay's* signature on the bill about six weeks before it became due. Nor did Mr. *James M'Kinlay's* name appear in Mr. *Walker's* account books until after the bill was due.

George Steele, one of the Appellants, stated that Mr. *Walker* told him that *James M'Kinlay* was to sign a bill for £1000 along with his sons, *William* and *Thomas*, as a security for them; and that afterwards, at an auction on the 26th of May, 1874, he (witness) saw *James M'Kinlay* take what he supposed to be a bill out of his pocket and give it to Mr. *Walker*; and shortly afterwards, on the same day, in the *Waverley Hotel, Glasgow*, Mr. *Walker* met the witness and said to him, "Do you know what *James M'Kinlay* was doing there?" He (the witness) said "He was giving you a bill." "Yes," he said, and he took it out of his pocket. "This is the bill, it is all right; it is signed by the old man," meaning *James M'Kinlay*.

By the account rendered to *W.* and *T. M'Kinlay* it appeared that Mr. *Walker* had advanced to them, on the 12th of May, 1874, £300, without the intervention of the father, *James M'Kinlay*, and other sums, amounting to about £1600.

The Lord Ordinary (1), on the 7th of June, 1878, pronounced an interlocutor, in which he found, *inter alia*, that the Appellants, the trustees of *J. E. Walker*, were entitled to recover from the Respondent, *Alexander M'Kinlay*, son of the deceased *James M'Kinlay*, the sum of £1000, contained in the bill libelled.

The Respondent reclaimed to the First Division, who, after hearing counsel, ordered the case to be tried before the Judges of both Divisions.

On the 1st of July, 1879, the majority of seven Judges held that *James M'Kinlay's* signature constituted no liability against him, and therefore none against the Respondent. The Judges in the minority were Lord *Gifford* and Lord *Shand*, and the Judges in the majority, the Lord President (2), the Lord Justice Clerk (3), Lord *Deas*, Lord *Ormidale*, and Lord *Mure*. The majority were of opinion (*a*), that *James M'Kinlay*, though not a drawee, must be regarded as an acceptor of the bill; and (*b*) that his signature did not constitute a valid acceptance, because sect. 11 of the *Mercantile Law Amendment (Scotland) Act* requires, as essential to the validity of an acceptance, that, besides the signature of the acceptor, there shall be written on the bill words indicative of his intention to accept, and the *Bills of Exchange Act*, 1878, does not dispense with the necessity of these added words, except in the case of acceptors who are drawees (4).

On appeal,

May 13, 15, 24. Mr. *Benjamin*, Q.C., and Mr. *Romer*, maintained for the Appellants that the late *James M'Kinlay*, by signing his name on the bill, came under an effectual legal obligation to pay its contents. A preliminary question was, whether the admission in the Appellant's condescendence that *James M'Kinlay* "indorsed the bill," "he so indorsed it as joint obligant with the acceptors," was such an affirmance of a fact as to nonsuit them. If not, then the only other question was, whether *James M'Kinlay* was bound by the bill. The evidence shewed (1) that he signed his name with the intention of binding himself, and

(1) Lord *Curriehill*.
(2) Lord *Inglis*.
(3) Lord *Moncreiff*.
(4) Court Sess. Cas. 4th Series, vol. vi. p. 1132.

H. L. (Sc.) 1880 STEELE v. M'KINLAY.

that it was part of the agreement before the money was advanced that he should do so; (2), that Mr. *Walker* took the signature as an obligation for the full amount of the bill; and (3), that he advanced the money only on the faith of this obligation. The argument which prevailed with the majority of the Judges below was, that if the signature means anything at all, it is in legal sense an "acceptance," and that it is insufficient in law as an acceptance in respect of the 11th section of the *Mercantile Law Amendment (Scotland) Act*, 1856, and 41 Vict. c. 13. But they maintained that *James M'Kinlay* did not become, in the technical sense, an acceptor of the bill, but a collateral obligant, and therefore these statutes did not apply. The Lord President gave three persons who were liable, besides the drawee: (1), "a party accepting for honour; (2), a person who is drawn upon may accept, because he holds the fund intended to be transferred to the payee; and (3), according to the law of *Scotland* a person may accept and will make himself liable after the drawee has accepted. He may make himself liable as an additional acceptor jointly and severally liable with the drawee." The latter was this case. There was no explanation offered of the fact of *James M'Kinlay's* signature on the back of a bill in which he had no interest, except that it was adhibited with the intention of binding himself. And Professor *Bell* says (Commentaries, 7th ed., vol. i., p. 428): "A collateral engagement may be undertaken by signing as indorser in circumstances which do not admit of a proper indorsement. Thus, no one can properly indorse who has no right to the bill, but the subscription as indorser with the intention of giving credit to the bill is an effectual collateral undertaking." In *Don* v. *Watt* (1) a father had interposed his credit for an advance of money to his son by signing his name on the back of an instrument to which he was not otherwise a party; both father and son were held liable on the note. Certainly that was the case of a promissory note, but no valid reason existed why in this particular a different rule should be applied to notes and bills of exchange. In *Macdonald* v. *Union Bank of Scotland* (2) *A.* drew a draft upon his own banker, and cashed it with another banker after receiving *B.'s*

(1) 26th May, 1812; F. C. vol. xvi., p. 647.

(2) Court Sess. Cas. 3rd Series, vol. ii. p. 963.

signature on the back of it; *B.* was held liable: see also *Penny* v. *Innes* (1) and *Jackson* v. *Hudson* (2), there *A.* drew a bill on *B.*, which was expressly accepted by *B.* and *C.*; Lord *Ellenborough* held that the signature of *C.* did not make him an acceptor, but imported a collateral undertaking: see *Byles* on Bills, 13th ed., pp. 189, 190; *Watters's Petition* (3), and *Matthews* v. *Bloxsome* (4), where the drawer was held to have a right against the first indorser as having made a new bill with the drawer.

But even if it should be held that the act of *James M'Kinlay* came within the legal category of an acceptance, *James M'Kinlay's* signature alone fulfilled the requirements of the statutes; for they submitted that the 11th section of the *Mercantile Law Amendment (Scotland) Act*, 1856, did not require any writing on the bill signifying acceptance but the signature.

The decision in *Hindhaugh* v. *Blakey* (5), which took the commercial world by surprise, was an appeal from a decision of the County Court of *Northumberland* as to the drawee's liability as acceptor upon a bill for £20. The judgment was that, according to the *Mercantile Law Amendment Act*, an acceptance must consist of something more than a mere signature. The Legislature immediately passed 41 Vict. c. 13, simply to declare that the law laid down in that decision was not in accordance with the meaning of the Legislature as expressed in the English and Scotch Mercantile Law Amendment Acts. But the signature in *Hindhaugh* v. *Blakey* was that of the drawee, and therefore the statute 41 Vict. c. 13, in obliterating that decision, did not need to go beyond the case of a proper drawee. Several of the Judges in the Scotch Court had, notwithstanding this, held *Hindhaugh* v. *Blakey* to be sound law; and the Lord President had held that 41 Vict. c. 13, was limited strictly to acceptances by the drawee, and that acceptance by all other persons required more than the signature (6). But the Appellants submitted that this was not the law, for it would be introducing into the Mercantile Law Amendment Acts a distinction between one kind of acceptors and another, of which

(1) 1 Comp. Mee. & Ross. 439.
(2) 2 Camp. 447.
(3) F. C. vol. xix. 489.
(4) 33 L. J. (Q.B.) 209.
(5) March 2, 1878; 3 C. P. D. 136.
(6) See Court Sess. Cas. 4th Series, vol. vi. at p. 1139.

10 Jur. N.S. 998

H. L. (Sc.) 1880

STEELE v. M'KINLAY.

there had previously been no trace. The 41 Vict. c. 13, simply declared the law, and enacted nothing new.

Further, if words were required over the signature of *M'Kinlay* to bind him, his handing the bill to *Walker* with the intention of being bound, was a mandate to *Walker* to fill up the bill, or to prefix to *M'Kinlay's* signature any words in accordance with the real intentions of the parties; and that authority being given you must take that to be done which ought to have been done. The contention that Mr. *Walker* being the drawer is liable before *M'Kinlay*, was rebutted by the evidence that *Walker* would not advance the money unless *M'Kinlay* was responsible. Regarding the fact that it was part of the arrangement that *James M'Kinlay's* name should be on the bill, no argument under the Stamp Acts could be successful. Nor did they intend to argue that it was a cautionary undertaking; but that it was a principal undertaking for the payment of the bill, and therefore the 6th section of the *Mercantile Law Amendment (Scotland) Act*, 1856, did not apply. Therefore, whether *James M'Kinlay* was viewed in the position of an acceptor or of a collateral obligant, they were entitled to succeed.

[They also cited *Russel* v. *Langstaffe* (1); *Montague* v. *Perkins* (2); *Armfield* v. *Allport* (3); *Forster* v. *Mackinnon* (4); *London and South-Western Bank* v. *Wentworth* (5), where cases fully reviewed.]

Mr. *John Pearson*, Q.C., and Mr. *Scott* (with them Mr. *Roger*), contended for the Respondent: (*a*) that an indorsement *primâ facie* is to be taken as an indorsement and nothing more; (*b*) and if an indorsement only it was immaterial at what time it had been put on the bill; (*c*) it rested with those who say a simple indorsement means more than a common indorsement to prove it with absolute evidence. But the evidence here went no further than to shew that *Walker* desired *James M'Kinlay's* name on the bill to enable him at a future time to discount the bill. It was not to hold the father liable if the sons failed. The bill was only

(1) 2 Doug. 514.
(2) 22 L. J. (C.P.) 187.
(3) 27 L. J. Exch. 42.
(4) Law Rep. 4 C. P. 704.
(5) 5 Exch. D. 96.

a temporary obligation for one of several sums, for the whole of which there was to be a permanent obligation in the way of a mortgage, which was arranged for so early as May, 1874, and granted afterwards by *W.* and *J. M'Kinlay* for the full amount of advances, viz., £5000, which admittedly included the bill for £1000; besides sums advanced by Mr. *Walker* to the two sons on their own security long before the bill was drawn. *Matthews* v. *Bloxsome* (1), if sound law, did not apply, for there it was under the man's own hand that he intended to be liable: that was not the case here. The real position of *James M'Kinlay* was that of indorser, who would be liable to a *bonâ fide* holder who had discounted the bill: see *dictum* of Mr. Justice *Byles* in *Foster* v. *Mackinnon* (2). But if said to be an acceptance, then *James Mackinlay* not being the drawee, the signature did not comply with the 11th section of the *Scotch Mercantile Law Amendment Act*, 1856; that statute was passed to correct abuses in regard to bills of exchange, one of which was that nearly every bill had to be explained by extraneous evidence. The 1 & 2 Geo. 4, c. 78, enacted in respect to inland bills, that no acceptance should be sufficient unless "in writing on such bill;" the words added by the 11th section that there must be a signature clearly shewed the purpose of the Legislature that both should be required. The argument that since the statute of 41 Vict. c. 13, the signature of all acceptors is sufficient, is not well founded. That statute was confined entirely to the case of a drawee, and was limited to the circumstance which had arisen in *Hindhaugh* v. *Blakey* and with good reason so limited; for the words of address to the drawee followed by the signature could leave no doubt as to the purpose of the signature. A party may be a drawee who never accepts, and whose signature never appears on the bill, and many persons may be liable on a bill who are not drawees, such as acceptor for honour, and formerly by the law of *Scotland* a person whose name was found upon the bill, although intending to be a mere cautioner, was held an acceptor, but could not by any conceivable reasoning be held a drawee. Therefore, there being by the law of *Scotland* such a thing as an acceptor who is not a drawee, the Act 41 Vict. c. 13, did not apply. It is argued that

(1) 33 L. J. (Q.B.) 209. (2) Law Rep. 4 C. P. at p. 712.

H. L. (Sc.) 1880 STEELE v. M'KINLAY.

the subscription of a name on the back of a bill, as here, is not an acceptance, but a collateral obligation, and is therefore not struck at by the Mercantile Law Amendment Acts. But it is rendered quite plain by *Sharp* v. *Harvey* (1), *Macdougall* v. *Foyer* (2), *Don* v. *Watt* (3), and *Watters* (4), that in *Scotland*, previous to the Act, the superscription of his name upon a bill by a person who had no right to it might put him in the position of acceptor, having full liability as such as regards the creditor in the bill. But the Appellants sought to call this liability, though in every respect identical with an acceptance, a collateral obligation, this was a distinction without a difference. Further, if this so-called collateral obligation can be distinguished from an acceptance, it can only be as a kind of guarantee, and it is clearly provided by the 6th section of 19 & 20 Vict. c. 60, that guarantees shall have no effect unless they be in writing, and also subscribed by the party. *Macdonald* v. *Union Bank of Scotland* (5), did not apply to the case here. In the circumstances they submitted that the Respondent was not liable for the amount of the bill as representative of *James M'Kinlay*.

[They also commented on *Ansell* v. *Baker* (6); *Chitty* on Contracts, 10th ed. p. 495; *Case of Jackson* v. *Duchaire* (7).]

Mr. *Romer*, in reply.

The Law Peers having considered their judgment, delivered the following opinions.

LORD BLACKBURN:—

My Lords, this is an appeal against that part of the interlocutor of the 1st of July, 1879, by which the first Division of the Court of Session, in conformity with the opinion of the majority of the seven Judges who heard the case argued, found "that the document founded on No. 6 of process constituted no obligation against the late *James M'Kinlay*, and therefore constitutes none against

(1) Morr. Appex. *voc.* Bill of Exchange, 2.
(2) 13 Feb. 1810; F. C. vol. xv.; 579.
(3) 26 May, 1812; F. C. vol. xvi.; 647.
(4) 7 March, 1818; F. C. vol. xix.; 489.
(5) Court Sess. Cas. 3rd Series, vol. ii. p. 963.
(6) 15 Q. B. 20.
(7) 3 T. R. 551.

the defender, *Alexander M'Kinlay.*" The document in question is a bill of exchange in the following form:—[His Lordship read the bill as given above, and continued:—]

I have come to the conclusion that this interlocutor is right. But I have not come to this conclusion on quite the same grounds as any one of the Judges below. And as all cases relating to the form and effect of bills of exchange are in this commercial country of very great consequence, I think it desirable to state my reasons fully. I will first state what, according to my view of it, is the effect of the evidence produced. *James M'Kinlay*, the person whose signature appears on the back of the bill, was the father of *William* and *Thomas M'Kinlay*, and had assisted in setting them up in business as wood merchants at *Strabane*. *William M'Kinlay* is the only witness who knows anything about the arrangements between his deceased father and his firm of *W. & T. M'Kinlay;* and his evidence, which is in no way contradicted, is as follows:—"It was not intended originally that this money should be advanced by my father. My father promised to arrange a loan for me after delivering over the premises, and I signed this £1000 bill as a preliminary transaction; but in what way he intended to do it at that time I was not aware. Whether I signed the bill blank, or not, I don't remember the contents of it; but it was my father who got it. My father was not to become responsible for the loan, either by giving it himself, or becoming liable to the party who should ultimately advance it. It was intended to obtain the money on security of a mortgage. In giving the bill, I did not understand that my father would become a party to it. I knew by the letter remitting the money that Mr. *Walker* was the party who had advanced it. I had no doubt that was the money for the bill in question. I knew that the money came from him, but under what circumstances I did not understand." *James M'Kinlay* did enter into a negotiation with *John E. Walker* respecting an advance of money to *W. & T. M'Kinlay*. Both *James M'Kinlay* and *J. E. Walker* are dead. And what passed between them, except so far as it was reduced into writing, must be to a great extent a matter of inference. Some things are perfectly clear. *J. E. Walker* remitted to *William & Thomas M'Kinlay* £949 on the 1st of June, 1874, in the

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Blackburn.

following letter:—"1st June, 1874. I send you herewith letter of credit in your favour for £949 0*s.* 4*d.*, being proceeds of your acceptance as under noted, of which you will be kind enough to acknowledge receipt. Note.

Amount of acceptance		£1000	0 0
Interest	£50 0 0		
Stamp	0 10 0		
Bank Commission . .	0 9 8		
		50 19	8
Remitted by *L. C.*		£949	0 4"

And this document, described in the letter as "your," *i.e.*, *William & Thomas M'Kinlay's*, acceptance, was the document No. 6 of process in the interlocutor mentioned. And it is also clear from the extract from *J. E. Walker's* ledger that on various days, beginning on the 12th of May and ending on the 14th of October, 1874, *Walker* also advanced to them £1600; for which sum, with interest and stamps, in all £1676 3*s.* 6*d.*, *William & Thomas M'Kinlay*, on the 30th of November, 1874, accepted three bills for £558 14*s.* 6*d.* each. And there is nothing to shew that *James M'Kinlay*, whose death took place in September, 1874, ever made himself liable for or was considered by *J. E. Walker* to have made himself liable for this £1600 or any part of it. And it is material here to observe that £300 was advanced on the 12th of May, 1874, a fortnight before the bill for £1000 was drawn. That sum, at least, must have been advanced to *William & Thomas M'Kinlay* on their own credit, or on the faith of the mortgage to secure £5000, which, though not executed till the 3rd of February, 1875, must have been arranged for some time before; it does not anywhere appear when. But, as far as regards the £1000 bill of the 25th of May, 1874, there does appear on the back of it the indorsement of *James M'Kinlay*.

It appears from the evidence of Mr. *Black*, *Walker's* book-keeper, that he, by *Walker's* directions, drew the bill in question, the body of which is in his writing, that he gave it to *J. E. Walker*, who himself sent it out for acceptance. This bill, as prepared by *Black*, was not in any way addressed to *James*

M'Kinlay. The next thing this witness speaks to is that *Walker* told him that he had received back the bill accepted, and directed him to remit the money, which he did by the letter which I have already read. He further states: "I entered the bill in Mr. *Walker's* books, some time in June, 1874, to the debit of *W.* and *T. M'Kinlay.* The name of *James M'Kinlay* was not entered at all in connection with it. Mr. *Walker* was in the habit of looking at the books every morning, and must have seen the entry as to the bill. I remember a mortgage being granted by *W.* and *T. M'Kinlay* to Mr. *Walker.* It was not entered in the books. Mr. *Walker* said to me that what sums he had advanced to *W.* and *T. M'Kinlay* were covered by the mortgage. *Q.* Was the sum in the bill covered by the mortgage?—*A.* It was understood. *Q.* Did Mr. *Walker* say so?—*A.* Decidedly. There were subsequent bill transactions with *W.* and *T. M'Kinlay,* the sums in which also went into the mortgage."

Now it seems to me, with great respect to the Judges below who find the fact otherwise, that it is not a proper inference of fact that *Walker* drew the bill, and sent it to *James M'Kinlay* in order that he might accept it, or treated the signature of *James M'Kinlay,* after he got it, as an acceptance. If that had been so, he would surely have caused *Black* to draw the bill on *James M'Kinlay,* and he would have caused *James M'Kinlay's* name to be entered in his books. But, no doubt, when *James M'Kinlay* put his name on the back of the bill, and handed it to *Walker,* he must have done so for some object, and it may be conjectured that it was in consequence of some request from *Walker,* which, as there is no writing proved, must be taken to have been verbal. But this, I think, is only conjecture. The only evidence produced bearing on this point is that of *George Steele.* Taking that to be all accurate, it leads to the conclusion that *Walker* was very glad to get the signature of the old man, which he thought made his security better; and, if I were to indulge in conjecture, I should think it probable *Walker* had said something to him about this being a large sum to advance on the faith of a mortgage being executed hereafter, which was not yet prepared, and that *James M'Kinlay* promised that, if for any reason that mortgage went off, he would see that bill paid. I

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Blackburn.

certainly cannot, especially after seeing that £300 had been already advanced on the 12th of May, and that £1300 more was advanced afterwards, draw the conclusion which is drawn by Lord *Shand*, that the money was advanced particularly on the faith of the signature of *J. M'Kinlay*, without which the loan would not have been given.

This brings us to the question whether there was, under such circumstances, according to the law of *Scotland*, any obligation constituted against *J. M'Kinlay* in his lifetime.

The *Mercantile Law* (*Scotland*) *Amendment Act*, 19 & 20 Vict. c. 60, and the *Mercantile Law* (*England*) *Amendment Act*, 19 & 20 Vict. c. 97, were passed for the purpose of remedying a mischief recited in the preambles of both Acts in the same language: "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *Scotland* being in some particulars different from those of *England* and *Ireland* in matters of common occurrence."

Now, by the Common Law of *England* a contract to answer for the debt of another person might be proved in the same manner as any other contract. And I agree with what Lord *Gifford* in this case intimates, that there is no reason, either of justice or equity, why, when such a contract is proved to have been entered into by word of mouth, it should not be carried out by law. But he proceeds to say that there is no statute against it; and there I must differ from him. It was thought by the English Legislature that there was danger of contracts of particular kinds being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract; and therefore it was provided by the *Statute of Frauds*, 29 Car. 2, c. 3, s. 4, that no action should be brought *inter alia* "upon any special promise to answer for the debt, default, or miscarriage of another person," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This enactment compels the Courts to refuse to enforce such a promise, however clearly it may be proved, unless there be the statutable evidence.

There are constantly cases occurring in which it is felt that it is morally very wrong to set up such a defence, and in which, as has been sometimes said, the statute for the prevention of frauds operates as a statute to facilitate fraud—nevertheless, on grounds, not, I take it, of justice but of expediency, this statute has been not only kept in force, but extended. It did not, however, before 1856, apply to *Scotland*. And the consequence was that the validity of such an agreement depended upon whether it was to be determined according to English or Scotch law. This fell precisely within the inconvenience recited in the preambles of 19 & 20 Vict. c. 60, and 19 & 20 Vict. c. 97. The Legislature might have remedied it, by, in 19 & 20 Vict. c. 97, altering the law of *England* so as to make it similar to that of *Scotland*, or by altering both laws so as to make something new be the law in both countries. What they did do was by 19 & 20 Vict. c. 60, s. 6, to extend the law of *England* to *Scotland*. By the general law of merchant adopted with some modifications, I believe, in every civilized country, and certainly in both *England* and *Scotland*, the acceptor of a bill of exchange comes under an obligation to any one who becomes the holder to pay him, and the drawer comes under an obligation to the holder to pay him, if the person on whom the bill is drawn does not accept and pay the bill, and the drawer has due notice of the dishonour. And any one who indorses that bill comes under an obligation to all subsequent holders of the bill precisely similar to that of the drawer, but he does not come under any such obligation to prior parties to the bill.

Pothier, Contrat de Change, No. 79, speaking of the contract by the indorser to his indorsee, says, "*Ce contrat est entièrement semblable à celui qui intervient entre le tireur et le donneur de valeur. Il produit entre l'endosseur et celui à qui l'ordre est passé, soit en cas de refus de paiement, soit en cas de refus d'acceptation, les mêmes obligations et les mêmes actions que la lettre de change produit entre le tireur et le donneur de valeur*" (1). There have been some expressions in English cases to the effect that an indorser is a new drawer. Speaking of these in *Gwinell* v. *Herbert* (2) Justice *Littledale* says, "It is said that in the case of a bill of exchange

(1) Works of *Pothier*, by *Dupin*, vol. iii. p. 155. (2) 5 Ad. & E. 439.

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Blackburn.

every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered as a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing." This obligation incurred under the custom of merchants is not affected by the *Statute of Frauds*; and it has been very properly decided in *Macdonald* v. *Union Bank of Scotland* (1), that it is not affected by the 6th section of 19 & 20 Vict. c. 60. The motive or object of the party who incurs the obligation on the bill may be to guarantee a third person; and that may be known to the person who gives value for the bill, but the obligation is, by the custom of merchants, on the bill.

But I think that since 19 & 20 Vict. c. 60, s. 6, the law of *Scotland* is as the law of *England* was before, that no undertaking to answer for the debt of a third person is enforcible unless there is a writing signed as the statute requires. The question therefore is in my mind whether there is an obligation under the custom of merchants, as modified in *Scotland*, incurred on the bill by *J. M'Kinlay* to *J. E. Walker*.

The acceptor does incur such an obligation to the drawer. This bill was drawn by *J. E. Walker* on *William* and *Thomas M'Kinlay*, and accepted by them, and *J. M'Kinlay* then wrote his name on it. Can he be treated as an acceptor? Even if he had expressly written "Accepted, *J. M'Kinlay*," he could not have been so treated according to English law. This was expressly decided in *Jackson* v. *Hudson* (2), Lord *Ellenborough* says, "The acceptance of the Defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honour of the drawer." I observe that Mr. *Bell*, in his Commentaries (3), falls into an error here as to the English law. He says that by it there can be no proper acceptance except by a drawee, "but a signature as accepter will raise a collateral undertaking." Lord *Ellenborough* did not say so. He said that the facts which the counsel offered to prove might have

(1) Court Sess. Cas. 3rd Series, vol. ii. p. 963.
(2) 2 Camp. at p. 448.
(3) Vol. i. (7th Ed.) p. 425.

been evidence of a collateral undertaking, if the declaration had been so framed. And so, no doubt, they would have been; and if there had been, in addition, a letter signed by *Hudson*, which could be construed as a memorandum of the contract, he would, on proof of them, have recovered. But Lord *Ellenborough* did not say that the writing of the words, "Accepted, *J. Hudson*," across the bill drawn upon *Irving*, was in itself a collateral undertaking, nor that it was in itself a sufficient memorandum within the *Statute of Frauds*. And I apprehend that neither position would have been tenable. Mr. *Bell* proceeds to say, "In *Scotland* a different view has been adopted, and, instead of a collateral undertaking, the subscription has been held to import a joint undertaking as acceptor of the bill or maker of the note." For this he cites three cases decided in *Scotland*, from which he draws that conclusion. He disapproves of it, and says, "The English doctrine is consistent with mercantile practice and understanding, but not quite so with the Stamp Law; the Scottish doctrine is not quite reconcilable to either." All the seven Judges below agree that the signature of *J. M'Kinlay* in this case could not operate as an acceptance; Lord *Gifford* and Lord *Shand* being of opinion that he, not being the drawee, and not intending to be an acceptor, did not become an acceptor at all. And Lord *Shand* examines at length the four cases, and it appears that there are no more, which are supposed to support the doctrine that such a writing of the name by one not a drawee might, in *Scotland*, operate as an acceptance, and shews that they do not support it, and my noble and learned friend opposite (Lord *Watson*) in his opinion, which I have had the advantage of reading, does the same, I shall say no more than that I am quite satisfied by their explanation of these cases. This is the reason on which I base my judgment, that the signature was not and could not be an acceptance. The other four judges hold that before 19 & 20 Vict. c. 60, s. 11, this name so written might have been treated as an acceptance, but that since that Act it can no longer be so. I should have great difficulty in agreeing in this reasoning after the passing of 41 Vict. c. 13, which not only enacts what the true construction of the Act shall in future be, but declares what it always has been. However, though not for the same reasons, all seven Judges

[H. L. (Sc.)
1880
STEELE
v.
M'KINLAY.
Lord Blackburn.

agreed that this signature could not operate as an acceptance; and I agree with them in that result.

But Lord *Shand* takes another view of the effect of writing the name, namely, that it operated as an indorsement by *J. M'Kinlay* to *E. Walker*, the drawer of the bill.

An indorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred; and it is clear that *J. M'Kinlay* was not such an indorser. But I quite agree that by the custom of merchants, as modified by English law, there may also be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer to a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was called an *aval* (said to be an antiquated word signifying "underwriting"), either on the bill itself or on a separate paper; and if such an *aval* was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given.

It appears from *Pothier, Du Contrat de Change*, Part I., chap. 4, Article VII., *De l'obligation qui naît des avals* (1), that the *aval* might be made by one who gave his name, either by way of incurring responsibility for the drawer, placing the signature under the name of the drawer, or for the indorser, placing it under the indorsement, or for the acceptor, placing it under that of the acceptance. An *aval* for the honour of the acceptor, even if on the bill, is not effectual in English law, as appears by *Jackson* v. *Hudson* (2). That case cannot now be questioned after the lapse of so many years, even if it could have been successfully impugned at the time, which I do not think it could. But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an *aval*. The effect, according to English law, of such an indorsement is recognised by Lord *Holt*, in *Hill* v. *Lewis* (3), and again in *Penny* v. *Innes* (4); such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently. It is not a collateral engage-

(1) Works of *Pothier*, by *Dupin*, vol. iii. p. 174.
(2) 2 Camp. at p. 448.
(3) 1 Salk. at p. 133.
(4) 1 C. M. & R. 439.

ment, but one on the bill; and it is for that reason, and because the original bill, by the custom of merchants, has incident to it the capacity of an indorsement in the nature of an *aval* on it, that such an indorsement requires no new stamp. The law of *Scotland* also gives effect to such an indorsement. Indeed, no better example of an indorsement having the effect of an *aval* for the drawer of a bill can be given than is afforded by *Macdonald* v. *Union Bank of Scotland* (1), where the cashier of the *Union Bank*, having refused to give cash on the credit of a cheque drawn on another bank, agreed to give it on *Macdonald* indorsing his name on it. This was held to make *Macdonald* liable as indorser to the *Union Bank*. In *Penny* v. *Innes* (2) it appeared that *Innes* (who, as I think we must understand the facts, had agreed with the Plaintiff to become indorser in the nature of an *aval* for *Wilson*, the drawer of the bill, who was about to transfer the bill to the Plaintiff), did not actually write his name on the bill till after *Wilson*, the drawer, had written his, and it was decided that the order in which the names were written was immaterial.

The case of *Matthews* v. *Bloxsome* (3) was much, and properly, relied upon by the counsel for the Appellants. It was one very peculiar in its circumstances: the Defendant had written to one of the Plaintiffs a letter in these terms:—"Sir, my brother *Richard* wishes me to join security with Mr. *Edmands* for £150. I beg to say I am quite agreeable to do so on the conditions entered into between you and him.—*J. Bloxsome.*" This, it appears, was thought by the Court not to be a sufficient memorandum in writing signed by *J. Bloxsome* to satisfy the *Statute of Frauds*, because the conditions were never put in writing. But *Richard Bloxsome* procured three bill stamps of an amount sufficient to cover £50 each. On the back of these *Edmands* and *J. Bloxsome* indorsed their names in order to enable him to obtain the £150 from the Plaintiff. *Richard Bloxsome* wrote across them, "Accepted, *Richard Bloxsome*," and delivered them in that state to the Plaintiffs, who gave him the £150. It was perfectly manifest that the Defendant gave authority to fill up the blank stamp paper in such a way as would make him liable as indorser

(1) Court Sess Cas. 3rd Series, vol. ii. p. 963.
(2) 1 C. M. & R. 439.
(3) 33 L. J. (Q. B.) 209.

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Blackburn.

to the Plaintiffs, and meant that to be done; if the blanks had been filled up by the Plaintiffs with the name of one of their clerks as drawer of a bill payable to bearer, there could have been no defence. But by a blunder of the Plaintiffs, it was filled up inserting their own names as drawers. No one could help wishing to baffle such a defence. I was a party to the judgment of the Queen's Bench by which they did so, but I greatly doubt if it was sound. It seems to me to be a very violent thing to construe a document which, on the face of it, purported not to be drawn by the Plaintiffs, and indorsed for them by the Defendant, who purported to be the drawer, as being, in consequence of extrinsic evidence, in legal effect drawn by the Defendant, and indorsed to the person who purported on it to be drawer. But that case, if good law, can only be an authority for considering a bill as if it were amended so as to be what it was intended to be, when the evidence is clear what the intention was, and that the bill was drawn up in its actual form by blunder. In the present case the bill on the face of it purports to be drawn by *J. E. Walker* on *William* and *Thomas M'Kinlay*, and to be payable to *J. E. Walker's* order. So far is that from a blunder, that I think it clear it was what was intended from the beginning. *J. M'Kinlay* wrote his name on the back, and any one who afterwards took the bill would have the right to hold *J. M'Kinlay* liable to him as an indorser, in the nature of an *aval* for the drawer. But it does not purport to be an indorsement to *Walker*, who was drawer, but the contrary. Even if it was intended, which I think is not clearly made out, that *J. M'Kinlay* was to bind himself as a surety for his sons to *J. E. Walker*, and wrote his name on the back of the bill with that intent, he did not carry out his intention. And to construe the bill, by the aid of the extraneous evidence, as operating as a drawing by *J. M'Kinlay* on *William* and *Thomas M'Kinlay*, and an indorsement by him as drawer to *Walker* would not be a rectifying a blunder made in drawing up the instrument, so as to construe it as if drawn up according to the original intention, but a making of a new instrument, because, owing to their mistakes of law, the instrument which they drew up did not operate as was wished. I therefore come to the conclusion that what was done cannot be effectual as a guarantee for *William* and *T. M'Kinlay*

for want of a writing signed, and that it cannot be effectual as an obligation on the bill, either as an acceptance or as an indorsement to *E. Walker*, who, on the face of the bill, purports to be the drawer, who would *primâ facie* be liable to indorsers, and not entitled to sue them.

The result is that I think the appeal should be dismissed.

LORD HATHERLEY:—

My Lords, in considering this case I had no doubt, immediately after the hearing, that no case could be made out upon this claim by treating the document signed by *M'Kinlay* the elder as a document with a guarantee, owing to the statute in the way of such a construction. The point on which I did entertain some doubt was as to what was the effect of the writing by *M'Kinlay* of the name upon the bill, seeing that it was necessary, as far as one could, to attribute some force and effect to the signature which he so added to the bill. But I had the advantage, whilst considering the case, of seeing the opinion of my noble and learned friend opposite (Lord *Blackburn*), who has just delivered that opinion to your Lordships, and it appeared to me to put the matter in so clear and precise a way that it would be an idle form and ceremony if I went over the same ground again; and also if I did so I might be appearing to give as the result of my own reasoning that which I have in fact finally and decisively been led into entirely by that opinion. Therefore I am quite content to rest my judgment, which coincides with that of my noble and learned friend opposite, upon the reasons which he has given in the opinion which he has now delivered to the House.

LORD WATSON:—

My Lords, in February, 1874, *William* and *Thomas M'Kinlay* commenced business as timber merchants at *Strabane*, in *Ireland*, under the firm of *W. & T. M'Kinlay;* and shortly thereafter they commissioned their father, the late *James M'Kinlay*, to procure for them in *Glasgow*, where he resided, an advance of £1000 on the personal credit of the firm. Some communings then took place between *James M'Kinlay* and the late *James Ewing Walker*, coach proprietor, in *Glasgow*, the result of which was that Mr. *Walker*

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Watson.

signed, as drawer, a bill bearing date the 25th of May, 1874, for £1000 at twelve months, addressed to "Messrs. *Wm. & Thos. M'Kinlay*, wood-merchants, *Strabane*," which he handed to *James M'Kinlay*. The latter forwarded the bill to his sons, who returned it duly accepted in their firm's name. *James M'Kinlay* then wrote his own signature across the back of the bill, and delivered it to Mr. *Walker*, who, on the faith of the document thus completed, remitted its amount, less discount, to the drawees. The drawer kept the bill until the 10th of March, 1875, when he discounted it with the *National Bank of Scotland*, signing as indorser. The drawees failed to pay the bill at maturity, and it was retired by Mr. *Walker*.

James M'Kinlay died in September, 1874, and Mr. *Walker* in September, 1875. The action in which the present appeal is taken was raised by the testamentary trustees of Mr. *Walker* (the Appellants) against *Alexander M'Kinlay* (the Respondent) as representing his father, the deceased *James M'Kinlay;* and its conclusions are for payment of the amount of the bill and interest, subject to certain specified deductions. Besides detailing the circumstances in which the bill was signed by the various parties whose names appear upon it, the Appellants endeavour to indicate, in their pleadings in the Court below, the character in which, and the purpose for which, *James M'Kinlay* adhibited his signature before delivering the bill to the drawee. Their record appears to me to be framed upon the footing that, in signing his name, *James M'Kinlay* intended to undertake, and did incur a direct obligation to the drawee in the event, which has occurred, of non-payment by the drawees; but its framers were obviously in great uncertainty as to the precise legal category to which that obligation ought to be assigned. In their summons the Appellants libel upon the bill as "indorsed by the said *James M'Kinlay*," in the condescendence they state that "he so indorsed it as joint obligant with the acceptors and co-acceptor with them for payment of its contents;" and again, in their answer to the separate statement of facts for the Respondent they aver that his name was "put upon the bill as an acceptor or joint obligant by arrangement." It has been contended by the Respondents, and several of the Judges in the Court below have held, that the only case made on record by

the Appellants is that *James M'Kinlay* was an acceptor, and consequently that their action must fail if that allegation is irrelevant or is not established. I think that is far too technical a view of the Appellants' pleadings. I adopt Lord *Shand's* reasoning upon this point, and concur with his Lordship in holding that the record fairly raises a more general issue, and that the case as it stands must be decided on the merits of the question whether *M'Kinlay* undertook liability to Mr. *Walker* for payment of the bill.

The Lord Ordinary, after the record was closed, allowed a proof before answer; and both parties led proof, which obviously is not confined to facts and circumstances attendant upon the making and issue of the bill, but includes evidence bearing upon the existence of an independent agreement between *James M'Kinlay* and Mr. *Walker* as to the liability to be undertaken by *M'Kinlay*. It is difficult to suppose that the Respondent would have permitted evidence of that kind to be led without objection, had he then read the record in the narrow sense for which he contended at your Lordships' Bar.

The Lord Ordinary on the 7th of June, 1878, gave judgment for the Appellants, and in his interlocutor for the same date, the first finding is to the effect that the Appellants "are entitled to recover from the Defender (Respondent), *Alexander M'Kinlay*, son of the deceased *James M'Kinlay*, the sum of £1000 sterling contained in in the bill libelled, with interest, &c."

The Respondent reclaimed against this judgment, and the First Division of the Court appointed the cause to be heard before themselves, with the addition of three Judges of the Second Division, on the question whether the first finding in the Lord Ordinary's interlocutor ought to be adhered to or altered. And on the 1st of July, 1879, the Lords of the First Division, in conformity with the opinion of the majority of the seven Judges, found that the bill libelled "constituted no obligation against the late *James M'Kinlay*, and therefore constitutes none against the Defender *Alexander M'Kinlay*," and assoilzied the Respondent.

The majority of the seven Judges consisted of the Lord President, the Lord Justice Clerk, Lords *Deas*, *Ormidale*, and *Mure*; Lords *Gifford* and *Shand* being the minority. The reasoning upon which the judgment of the majority is rested appears to be

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Watson.

(1) that *James M'Kinlay*, though not a drawee, must be regarded as an acceptor of the bill, and (2) that his signature did not constitute a valid acceptance, because sect. 11 of the *Mercantile Law Amendment (Scotland) Act* requires, as essential to the validity of an acceptance, that, besides the signature of the acceptor, there shall be written on the bill words indicative of his intention to accept, and the *Bills of Exchange Act*, 1878, does not dispense with the necessity for these added words, except in the case of acceptors who are drawees. Some of their Lordships, *e.g.*, the Lord President, treated the question as one of relevancy, holding, irrespective of any evidence, that the Appellants' case failed upon their own statement of it, namely, that *James M'Kinlay* was an acceptor. Others of their Lordships decided the question upon its merits, holding it to be proved that *James M'Kinlay* put his name upon the bill with the intention and result of his becoming an acceptor. But the Judges of the majority were unanimously of opinion that it is settled law in *Scotland* that *James M'Kinlay*, though not a drawee, might competently become a party to the bill *quâ* acceptor.

I am of opinion that the interlocutor of the First Division, so far as appealed from, ought to be affirmed, but, with all respect for the learned Judges of the majority, I am unable to concur in the reasons which they have assigned for their decision.

Various important decisions were raised and argued at your Lordshps' bar, but the only question which, in my opinion, the House requires to determine is this: What liability, if any, did *James M'Kinlay* undertake to *James Ewing Walker*, the drawer of the bill?

In considering that question, it is necessary to distinguish between the liabilities which the law merchant attaches to a person who, by signing, has become party to a bill, and those liabilities which may arise out of an understanding or agreement of parties extrinsic of the bill. In some cases the precise character and consequent liabilities of parties to a bill are conclusively fixed by the tenor of the document. The person who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law merchant, be liable otherwise than in their respective characters of drawer and acceptor.

In other cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill. But such proof, when it is admissible, must be strictly limited to facts and circumstances attendant upon the making, issue, or indorsement of the bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant.

This leads me to consider whether the late *James M'Kinlay*, as a party to the bill in the sense of the law merchant, was under obligation, failing payment by his two sons or their firm, to pay the contents to Mr. *Walker;* and in so doing, I assume as legitimate materials for inference all those facts connected with the making, issuing, and discounting of the bill to which I have already adverted.

The tenor of the bill is, in my opinion, conclusive against the view that *James M'Kinlay* was an acceptor. Save in the case of acceptances for honour or *per* procuration, no one can become a party to a bill *quâ* acceptor who is not a proper drawee, or, in other words, an addressee. That a person, not an addressee, who signs in the same circumstances as *James M'Kinlay*, thereby becomes an acceptor, has, however, been held in the Court below to be authoritatively settled in the law of *Scotland*. To that proposition, which depends upon the accuracy of a statement in the Commentaries of Mr. *Bell* (1), and which is repeated by Mr. *Thomson* in his Treatise on Bills of Exchange, I cannot assent. Mr. *Bell* infers, from the cases of *Don* v. *Watt* (2), and *Watters, Petitioner* (3), that in *Scotland* a signature as an acceptor by a person not a drawee, "is held to import a joint undertaking as acceptor

(1) Bell Com. vol. i. (7th Ed.) p. 425.
(2) 26th of May, 1812; Fac. Col. vol. xvi. p. 647.
(3) 7th of March, 1818; Fac. Col. vol. xix. p. 489.

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Watson.

of the bill or maker of the note;" but the learned author frankly concedes that the doctrine is not quite reconcilable with mercantile practice and understanding. It is, in my opinion, unnecessary to consider how much authority this House ought to require before sanctioning such a departure from the principles of the law merchant, because the cases cited by Mr. *Bell* do not appear to me to support the doctrine which he deduces from them.

The case of *Don* v. *Watt* (1) related not to a bill of exchange, but to a promissory note; and there is obviously no principle of the law merchant which can prevent any number of persons becoming bound as promissors along with the original grantor of the note. This distinction, which is a very material one, was not adverted to by the Court, who in this and the subsequent case of *Watters* (2) seem to have dealt with the cases of an acceptor and of a promissor as identical. But, assuming that the Court did deal with the promissory note upon principles which they hold to be equally applicable to bills of exchange, it does not appear upon what footing they held the Defender liable, whether as a party promissor or as bound by implied agreement to the payee. The Lord Ordinary expressly found that he was liable as indorsee, but the Inner House recalled that finding and decerned against him in general terms, without specifying in what character liability attached to him.

There are only two very meagre reports of the case of *Watters*. One of these is in the form of a note by Baron *Hume*, which runs thus; "A person who was meant to be a joint acceptor with two others put his name on the back of the bill. He is found liable nevertheless as joint acceptor, the purpose being plain. The bill came in place of a former, to which he was one of three acceptors." The other report is in the Faculty Collection, and the whole information given by the reporter as to the facts of the case is that *Watters*, along with two others, accepted a bill drawn upon them by one *Robert Barrie*; and then he adds: "Upon becoming due it was renewed, but *Watters* wrote his name upon the back of the bill." It is by no means clear that the renewed bill was not addressed to all the three acceptors of the original bill, including

(1) 26th of May, 1812; Fac. Col. vol. xvi. p. 647.

(2) 7th of March, 1818; Fac. Col. vol. xxix. p. 489.

Watters; and the probability that he was a drawee is strengthened by the report of the argument for the petitioner, who did not defend himself on the ground that, not being a drawee, he could not by his subscription become an acceptor. The only plea urged in defence was that the Petitioner was liable as an indorser, "because he had signed on the back of the bill," a very special plea, and one which seems to involve an admission that he would have been liable as acceptor if he had signed on the face of the document. But, be that as it may, the interlocutor of the Lord Ordinary, which became the judgment of the Inner House, and which is quoted at length in the opinion of Lord *Shand*, contains articulate findings which make it perfectly plain that the decision went upon considerations quite independent of *Watter's* position as a party to the bill.

Neither of the cases of *Sharp* (1) and *Macdougall* (2), which were cited in argument, has any bearing upon the doctrine in question. These are cases relating to the liability of a drawee who, in accepting, added to his signature the words "as cautioner;" and Mr. *Bell* (3) thus correctly states their import: "Acceptance as a cautioner is deemed absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill."

If *James M'Kinlay* cannot be regarded as an acceptor, no question can arise in regard to the *Mercantile Law Amendment (Scotland) Act*, 1856, and the *Bills of Exchange Act*, 1878. But I cannot help saying that if *James M'Kinlay*, apart from the provisions of these statutes, could or did become an acceptor according to the law of *Scotland*, I could not have agreed with the learned Judges of the majority in holding that his acceptance was invalid by reason of the provisions of sect. xi. of the Act of 1856. It appears to me that in construing the two Acts together their Lordships have misapprehended the true character and effect of the Act of 1878. They have dealt with that statute as if it were a repealing, and not, as it professedly is, a declaratory Act. They

(1) 1808. Morr. Dict. App. *voce* Bill of Exchange, No. 22.

(2) 13th of Feb. 1810; Fac. Col. vol. xv. p. 579.

(3) Bell Com. vol. i. (7th Ed.) p. 424.

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Watson.

assume that the case of *Hindhaugh* v. *Blakey* (1) was well decided, and that sect. xi. of the Act of 1856 requires in order to due acceptance, not only the signature of the acceptor, but words of acceptance to which the signature must be appended, and they read the Act of 1878 as repealing the provisions of sect. xi. in so far only as these apply to acceptors who are also drawees, leaving them still operative in the case of acceptors such as they have assumed or held *James M'Kinlay* to be. Now the Act of 1878 seems to me to be equivalent to a declaration that the case of *Hindhaugh* v. *Blakey* (1) was wrongly decided; and seeing that sect. xi. uses precisely the same language in regard to all acceptors falling within its scope, I should have found it impossible to read the clause as requiring words in the case of an acceptor in the position of *James M'Kinlay* which would not have been necessary had he been a drawee.

I am of opinion that the character in which *James M'Kinlay* did become a party to the bill was, both in fact and law, that of an indorser; and that in determining his legal position the circumstance that *M'Kinlay's* indorsement was written before the bill was delivered to the drawer and the money advanced by him is quite immaterial. No doubt a proper indorsement can only be made by one who has a right to the bill, and who thereby transmits the right, and also incurs certain well-known and well-defined liabilities. But it is perfectly consistent with the principles of the law merchant that a person who writes an indorsement with intent to become party to a bill, shall be held—notwithstanding he has not and therefore cannot give any right to its contents—to be subject, as in a question with subsequent holders, to all the liabilities of a proper indorser. I fail to see upon what principle *James M'Kinlay* can be interpolated as a party to the bill in question between the drawer and the acceptor. To hold that a stranger to the bill who writes his name across the back of it, before it has passed out of the hands of the drawer, thereby becomes liable to the drawer, failing payment by the drawees, appears to me to be as inconsistent with the principles of the law merchant as to hold that there may be a drawer other than the original drawer and payee, or that there may be an acceptor other than the drawee or one who accepts as his agent or for his honour. It may be con-

(1) 3 C. P. D. 136.

venient in some cases to describe the liability of a person whose name is on a bill, and who is neither payee nor drawee, as being the liability of a drawer or acceptor, but in these cases liability cannot arise from such person being either a drawer or an acceptor in the sense of the law merchant, but from some agreement extrinsic of the bill itself.

I should have had less difficulty in holding that *James M'Kinlay*, as party to the bill, was an indorser, and therefore not liable to pay to Mr. *Walker*, the drawer, when it was dishonoured by the acceptors, had it not been that the point seems to have been otherwise decided by the Court of Queen's Bench in *Matthews* v. *Bloxsome* (1). The report of the case is not satisfactory, and leaves room for doubt whether the decision was intended to go so far as the report states. If it was, I cannot avoid the conclusion that the decision is at variance with sound principles, and that whatever may now be its value as a precedent in *England*, it ought not to be taken as a good authority in a Scotch appeal.

It still remains for consideration whether the transaction between Mr. *Walker* and *James M'Kinlay* was completed on the footing that the latter was to be bound to the drawer failing payment by the drawees. As a party to the bill he was not so bound, still the Appellants would be entitled to decree if it were proved, by extrinsic evidence, that their author, Mr. *Walker*, advanced his money upon the faith of such an arrangement as they allege. But the Appellants have, in my opinion, failed to adduce evidence either competent or sufficient for that purpose.

It appears to me that the arrangement which the Appellants seek to prove is in effect an undertaking of guarantee, and accordingly that their proof, which so far as material consists of oral testimony, is excluded by the provisions of the 6th section of the *Mercantile Law Amendment* (*Scotland*) *Act*, 1856. I am not prepared to hold that an obligation to sign a bill as one of several drawees and acceptors necessarily constitutes an undertaking of guarantee; but in this case it is to my mind perfectly clear that *James M'Kinlay* never agreed to be an acceptor. *George Steele* deposes that Mr. *Walker*, before he got the completed bill, told him that "the old man" (meaning *M'Kinlay* the father) "was to

(1) 33 L. J. (Q. B.) 209.

H. L. (Sc.) 1880 STEELE v. M'KINLAY. Lord Watson.

sign the bill along with his two sons," and, after he got the completed bill, that it was "all right;" that it was signed by the "old man." But there is no evidence whatever that *M'Kinlay* was to sign in the character of an acceptor. The form in which the bill was drawn and sent for acceptance by Mr. *Walker* contradicts that supposition, and the witness, *George Steele*, states that Mr. *Walker*, two or three weeks before he remitted the proceeds of the bill in question to *Strabane*, told him (*Steele*) "that *James M'Kinlay* had asked him to advance £1000 for them" (*i.e.*, his two sons, the drawees) "upon his security," and that he "had agreed to advance it." Had *James M'Kinlay's* signature been sufficient, according to the law merchant, to make him liable to the drawer, the provisions of sect. 6 of the Act of 1856 would have been inapplicable, notwithstanding the fact that his obligation was in substance a guarantee; but when it is proposed, as in the present case, to establish by extrinsic evidence an obligation which is substantially a guarantee, the Act applies, and parol proof is incompetent.

If the Appellants' evidence were held to be competent, I am of opinion that it is not sufficient to establish any agreement or understanding on the part of *M'Kinlay* to the effect that he was to be liable to the drawer. There was apparently no third person present at their communings in regard to the bill, and there is no evidence of what passed between them except the indirect testimony of *George Steele* as to certain statements made to him by Mr. *Walker*. These hearsay statements through the decease of Mr. *Walker* became admissible in evidence, subject always to these qualifications: (1.) That they are to be received *cum notâ*, because the Respondents had no opportunity of testing their weight or credibility by cross-examination of the person who made them; and (2.) That when ambiguous they must be read *contra proferentem*. Whilst these statements must be held to express Mr. *Walker's* view of the transaction, they do not necessarily represent the understanding of *James M'Kinlay*. There is nothing in the case to suggest that either of them was unfamiliar with bill transactions, and it is nowhere proved that the liability which *M'Kinlay* was to incur by signing his name was ever discussed or referred to in the course of their communings. It lay with the Appellants to prove, and I think they have failed to prove, that

there ever was any mutual understanding or agreement as to that matter. The impression which careful perusal of the proof has left upon my mind is, that nothing more was agreed upon between the parties than that *M'Kinlay* should write his signature across the back of the bill, and that there was no *consensus in idem* as to the effect of the indorsement. The one agreed to give and the other to take his signature for what it was worth, *M'Kinlay* intending to resist and *Walker* to enforce liability, so far as the law would permit.

Being of opinion that *James M'Kinlay* was not, as a party to the bill, under any obligation to the drawer, and that there is no competent or sufficient evidence of his agreement to undertake such an obligation, I think the appeal ought to be dismissed.

LORD SELBORNE, L.C.:—

My Lords, having had the advantage of seeing the written opinions of two of my noble and learned friends who have already addressed your Lordships, and finding in them everything which I could myself have desired to say with respect to this case, I might well content myself with simply expressing my entire agreement with them; but as the decision in the Court below was mainly rested upon the view taken by that Court of the proper construction of the *Mercantile Law Amendment (Scotland) Act*, 1856, s. 11, and the subsequent Act of 1878 (41 Vict. c. 13), I think it right to add the expression of my own clear opinion that the Act of 1878 is in effect a declaration by the Legislature that the decision of the English Common Pleas Division in the case of *Hindhaugh* v. *Blakey* (1) was erroneous; and, as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, I think that the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill (which was the actual case in *Hindhaugh* v. *Blakey*) is necessarily to displace the whole construction of the English statute on which that decision was founded.

If, therefore, I had agreed with the majority of the Judges in

(1) 3 C. P. D. 136.

H. L. (Sc.)
1880
STEELE
v.
M'KINLAY.
Lord Selborne, L.C.

the Court below that *James M'Kinlay* ought to be held to have signed the bill in the present case as an acceptor, in the sense in which the term "acceptance" is used in the 11th section of the *Mercantile Law Amendment* (*Scotland*) *Act*, I should have been compelled to dissent from their conclusion in favour of the Respondent. But, for the reasons which have been already stated in the opinions of my two noble and learned friends, I hold it to be quite clear that *James M'Kinlay* was not an acceptor, within the meaning of that section or otherwise in any true and proper sense of the word, and that his liability, as insisted upon by the Appellants, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law merchant would infer from his mere signature as it appears upon the face of the bill, could only be proved by a writing properly signed under the 6th section of the statute, which writing in the present case is absent.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journal, 14th June, 1880.

Agents for Appellants: *Simson & Wakeford.*
Agents for Respondent: *Holmes, Anton, & Greig.*

[HOUSE OF LORDS.]

CAMPBELL . . . . . APPELLANT;
CAMPBELL . . . . . RESPONDENT.

H. L. (Sc.)
1880
July 8.

Scotch Conveyance — Succession — Unqualified General Disposition — Admissibility of Extraneous Evidence—Evacuation of Special Destination in a Settlement having no Prohibitory Clauses.

In the law of *Scotland*, general words of disposition in a *mortis causâ* deed, are, in the absence of any proof of a contrary intention, (and the law of *Scotland* allows such contrary intention to be proved by evidence of a kind which in *England* would not be admissible for that purpose,) sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs substitute.

A. was fee simple proprietor of the estates of *Kintarbert* and *Crossaig* in *Scotland*. He died leaving a disposition and settlement, without prohibitory clauses, disponing these lands to *B.* and his heirs male, whom failing, to *C.* and his heirs male, whom failing, to certain cousins in succession and their respective heirs male. *B.*, who owned other estates, took possession, and died leaving a *mortis causâ* deed, giving, in language entirely general, all his heritable and moveable property to *C.* and his heirs, whom failing, to his sister *D.*

C. entered into possession of all *B.*'s estates, and soon afterwards died intestate and without issue. The sister, *D.*, then, as heiress of provision under *B.*'s general *mortis causâ* deed, claimed the estate of *Kintarbert* and *Crossaig* as well as the other lands of *B.* *E.* disputed *D.*'s right, claiming these estates as heir of provision under *A.*'s settlement; contending that the general terms of *B.*'s deed could not be held to include *Kintarbert* and *Crossaig*, lands already settled upon a destination of heirs; nor was this *B.*'s intention:—

Held, affirming the decision of the Court below, that *D.* was entitled, because *B.* was absolute fiar, being the heir in possession under a settlement or entail without fetters, and therefore a general disposition by him passed these lands as part of the *universitas* of his estate, there being nothing in the mere nature of such a special destination, as here, to prevent it; and no proof of any contrary intention to limit the operation of such general words.

Thoms v. *Thoms*, 1868 (Court Sess. Cas. 3rd Series, vol. vi. p. 704) held rightly decided.

Campbell v. *Campbell*, in this House, Feb. 17, 1743 (Morr. 14,855; 1 Pat. App. 343) not to be reconciled with *Leitch* v. *Leitch*, in this House in 1829 (3 W. & S. 366).

Per LORD SELBORNE, L.C.:—If two cases in this House are not to be reconciled, the authority which is at once the more recent and the more consistent with general principles ought to prevail.

APPEAL from the Second Division of the Court of Session, *Scotland.*

H. L. (Sc.)
1880
CAMPBELL
v.
CAMPBELL.

The question in this case was, whether the general disposition and settlement dated the 24th of November, 1838, of the late Mr. *Lachlan M'Neill Campbell* did, or did not, convey his estates of *Barrinellan* (otherwise *Kintarbert*) and *Crossaig*?

The Respondent, Miss *Isabella Campbell*, claims that it does; and the Appellant, Mr. *John Breadalbane Campbell*, that it does not, but that the succession to these estates must be determined by the settlement made by a former proprietor, General *Robert Campbell*, in 1821. Under that disposition the Appellant is assumed by the Respondent, for the purpose of this case, to be the heir of provision.

The late General *Robert Campbell* possessed the estates in question in fee simple. He died in 1837 without issue, leaving the settlement dated 1821; the dispositive clause, which includes the destination, of this deed, is: "I, Major-General *Robert Campbell* of *Kintarbert*, in the event of my dying without lawful heirs of my body, do hereby give, grant, assign, dispone, and convey to and in favour of my nephew *Lachlan M'Neill*, and the lawful heirs male of his body; whom failing, to my nephew *Dugald M'Neill*, and the lawful heirs male of his body; whom failing, to my nephew Lieutenant *Robert M'Gibbon*, and the lawful heirs male of his body; whom failing, to my nephew *Archibald M'Gibbon*, and the lawful heirs male of his body; whom failing, to my cousin Lieut. *Dugald Campbell*, in the half-pay of the 72nd Regt., and the lawful heirs male of his body, all and sundrie lands, heritages, . . . and all other estate, heritable and moveable, real or personal, whatever, wherever situated or however constituted, which shall pertain and belong to me at the time of my death."

The Appellant is the son and heir of General *Campbell's* cousin german, *Dugald Campbell*.

To the general disposition and settlement there was a codicil dated 1832, but as it does not affect the question here, it need not be specially referred to. General *Campbell's* disposition set forth that the disponees and their heirs respectively succeeding to the lands should be bound to take the name of *Campbell*.

Lachlan M'Neill took the name of *Campbell*, and made up his title under General *Campbell's* disposition by charters of adjudication dated 1839 and 1840, granted in his favour by the superiors

of each estate; the line of heirs designated being the same as specified in General *Campbell's* disposition. At the time he succeeded to his uncle's estates he was already proprietor of *Drimdrissaig*, which he had inherited from his father. And a few months before the execution of the *mortis causâ* disposition founded on by the Respondent, he bought the estate of *Saddell*. The value of these estates are admittedly as follows:—*Drimdrissaig*, £13,000; *Saddell*, £44,000; and *Kintarbert* and *Crossaig* are worth upwards of £31,000. Having these estates, he executed the disposition in question, which is dated the 24th of November, 1838. The dispositive clause is as follows:—

"I, *Lachlan M'Neill*, of *Drimdrisaig*, considering it to be a duty incumbent on me to settle my affairs in case of death, have therefore given, granted, assigned, and disponed, as I do hereby, with and under the burdens, provisions, and reservations aftermentioned, give, grant, assign, and dispone to and in favour of *Dugald M'Neil*, Lieutenant in Her Majesty's 78th Regiment of Foot, my brother german, his heirs and successors, whom failing, to *Isabella M'Neill*, my sister german, and her heirs and successors, all and sundry lands and heritages, goods, gear, debts, and sums of money, and in general the whole estate and effects, heritable and moveable, real and personal, of what kind or denomination soever, or wheresoever situate, at present belonging, or that shall pertain and belong to me at the time of my decease, together with the whole vouchers and instructions, writs, and evidence of and concerning my estate and effects, heritable and moveable, and generally and particularly above conveyed, with all that has followed or may be competent to follow thereon, &c."

Lachlan M'Neill also left a codicil, dated the 11th of September, 1846, in which he described himself as "*Lachlan M'Neill Campbell*, of *Kintarbert*," leaving an annuity to Miss *Isabella M'Neill*, the Respondent, in the event of her not succeeding him in his estates.

Lachlan died in 1852, and he was succeeded by his brother, *Dugald M'Neill*, who made up his titles to the estates of *Kintarbert* and *Crossaig* by obtaining precepts of *clare constat* as the heir called after his brother in General *Campbell's* settlement. He died

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL.

in 1874, without issue and without having made any new disposition and settlement of the estates, and the Respondent has since possessed them. On the 3rd of January, 1876, she obtained a general service as nearest and lawful heiress of provision under *Lachlan's* general disposition and settlement, and having thus taken up the personal right vested in her under that deed, she brought this action of declarator and adjudication against the Appellant, who, sometime after her succession, put forward a claim as heir under General *Campbell's* disposition.

The Lord Ordinary (1), on the 28th of June, 1878, pronounced an interlocutor, holding that the lands of *Barrinellan* (otherwise called *Kintarbert*) and *Crossaig* belonged to the Pursuer (Respondent) as heiress of provision under the general disposition and settlement of *Lachlan M'Neill Campbell.*

Against this interlocutor the Appellant lodged a reclaiming note; but the Judges of the Second Division, being of opinion that the question had been already decided in the case of *Thoms* v. *Thoms* (2), refused the note and adhered to the Lord Ordinary's interlocutor (3).

On appeal,

June 10, 11, 14, 15. Mr. *H. Davey*, Q.C., and Mr. *Darling* (of the Scotch Bar), maintained for the Appellant that the general terms of *Lachlan's* deed could not be held to include *Kintarbert* and *Crossaig*. It was settled in the law of *Scotland* that such a general disposition does not comprehend estates which have been already settled on a line of heirs by a previous deed of the same proprietor. The like rule applies when the existing destination is settled, not in a deed of the same grantor, but in a deed under which he has himself taken the estate. The Judges in the Court below rested their decision entirely on the case of *Thoms* v. *Thoms*, 1868 (2) decided by nine Judges to four, that a general disposition where no extrinsic or other facts controlled it, did carry estates destined such as these. That case did not come to this House, and in *Scotland* had been held very doubtful. Certainly

(1) Lord *Rutherfurd Clark.*
(2) 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.
(3) 1868. Court of Sess. Cas. 4th Series, vol. vi. p. 310.

several of the Judges in *Thoms' Case* (1) relied on *Leitch* v. *Leitch*, in this House, 1829 (2), but the question decided there was not that here. And in the latest case in this House, *Glendonwyn* v. *Gordon*, 1873 (3), the rule laid down in *Thoms' Case* (1) was doubted by the Lords, who gave detailed opinions.

The Appellant submitted that mere general words purporting to dispose of a man's whole property in a will or *mortis causâ* deed must, unless there be something in the deed itself to control that presumption, be understood of property, the succession to which, after the death of the testator, is not already regulated by a prior instrument. But in respect of lands already settled there was a presumption in law against the ordinary effect of such general words,—that is, there was a more limited meaning given by law to those words which prevent them from evacuating the special destination. Evidence was admissible to rebut such a presumption, but the burden of producing it lay on the Respondent. An analogous case was that of double portions: see *Tussaud* v. *Tussaud* (4), and an earlier case by Lord *Eldon* there cited *Trimmer* v. *Bayne* (5); *Hall* v. *Hill* (6).

[LORD SELBORNE, L.C.:—The nearest analogy is that the word "fishings" in a Scotch deed will not give *salmon* fishing, therefore a presumption against it, but extraneous evidence of possession, &c., of the salmon fishing, is allowed to rebut this presumption.]

Here there was nothing in the deed itself, nor in the extraneous circumstances, to control favourably to the Respondent such a presumption.

But supposing there was a presumption the other way, viz., that general words of conveyance must be held to include even lands already settled, unless, on competent evidence, the contrary appear to be the true intention of the grantor of the deed. The earliest case was *Campbell* v. *Campbell*, 1873 (7); then came *Farquharson* v. *Farquharson*, 1759 (8). And the quality and sources

(1) Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

(2) 3 W. & S. 366.

(3) Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

(4) 9 Ch. D. 363.

(5) 7 Ves. 508.

(6) 1 D. & War. 94.

(7) Morr. 14,855; Kames' Remark. Dec. p. 25; affirmed H. L. 17 Feb. 1743, 1 Pat. App. 343.

(8) Morr. 2290; affirmed, 20th Feb. 1759, H. L. 6 Pat. App. 724. See

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL.

of competent evidence had been considered in *Glendonwyn* v. *Gordon*, 1873 (1). These cases shewed that the House is at liberty to look at extraneous circumstances for the interpretation of the deed: see also *Gray* v. *Gray* (2) before the Court of Session since *Glendonwyn*. Here there were three circumstances which, taken in conjunction, shewed that *Lachlan* did not intend by the deed in question to convey *Kintarbert* and *Crossaig*; (1) the succession to these estates of General *Campbell* were subject to the obligation to assume the name of *Campbell*, this condition was complied with by *Lachlan M'Neill*, yet nevertheless by the deed in question *Lachlan* names himself "*Lachlan M'Neill*," and, as still further to designate the set of estates to which the deed was to have application, he calls himself "of *Drimdrissaig*;" (2) the amount and quality of *Lachlan's* own estates of *Drimdrissaig* and *Saddell* rendered the more limited interpretation of the general words entirely appropriate; and (3) subsequent to the deed in question *Lachlan* made up his titles to *Kintarbert* and *Crossaig*, and the line of heirs called in the charters of adjudication was expressly the line specified in General *Campbell's* deed. At the time these feudal titles were taken out the line of heirs fell to be dictated by the vassal; therefore if *Lachlan* had regarded the succession to his uncle's estates, after his own death, as falling to be determined by the general settlement which he had already executed, the destination in the charters of adjudication should have been the same as in his own disposition. Though the destination in the charters of adjudication cannot prevail against the destination in *Lachlan's* own deed, assuming the latter otherwise to carry the estates; in the question whether *Lachlan's* deed was intended to apply to those estates it was a significant fact that the feudal investiture was taken on the contrary assumption.

The Lord Advocate (Right Hon. *J. McLaren*), and Mr. *E. E. Kay*, Q.C., contended for the Respondent that the general words of *Lachlan's* deed should take effect upon all his estates. The

---

opinions of the Law Peers for the material facts of the cases of *Campbell*, *Farquharson*, *Glendonwyn* and *Leitch*.

(1) Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

(2) Court of Sess. Cas. 4th Series, vol. v. p. 820.

Appellant did not attack that proposition as unreasonable, or that *Lachlan* had not the power to convey them at pleasure, but he alleges that in law such a general disposition as that in question has not this effect; and, secondly, that in fact there is evidence to shew a contrary intention. But the Respondent submitted that apart from competent evidence of a contrary intention, contained either in the general disposition itself or in any other deed by the same grantor, or such facts as may be referred to to limit the natural meaning of the words of conveyance, a general disposition carries every particular estate which belongs to the grantor at his death. Ever since the case of *Leitch* v. *Leitch* in 1829 (1), the law was considered settled, and that was a decision on the point in question, which has been given effect to in subsequent cases: see *Baine* v. *Craig*, 1845 (2).

Leitch v. *Leitch* (1) might be inconsistent with the finding in *Campbell* v. *Campbell* (3) in 1743, but there the peculiar facts were held to control the deed. But even if that was a subsisting decision, the words used having reference to personal estate (4), it was wholly different from, and no precedent for, this case. In *Farquharson* v. *Farquharson* (5) the strength of the case lay in the special circumstances that the grantor of the deed was a party to subsequent deeds which shewed an intention to except particular estates. That case is quite consistent with the Respondent's contention. *Thoms* v. *Thoms*, 1868 (6), was a decision of the whole Court of Session, directly in point, and the House would be slow to overrule the result there arrived at on a question of Scotch conveyancing, which had regulated the succession to many estates since: see also *William and James* v. *Maclines' Trustees*, 1872 (7); *Dyer* v. *Carruthers*, 1874 (8)—there personal estate—but a general disposition was held to evacuate a properly constituted substitution. A *mortis causâ* general disposition was also held good in

(1) 3 W. & S. 366.

(2) Court of Sess. Cas. 2nd Series, vol. vii. p. 845.

(3) Morr. 14,855; affirmed H. L., 1 Pat. App. 343.

(4) *Brown* v. *Coventry*, 2nd of June, 1792, Bell's Cases, 310; *Johnston* v. *Greig*, 1833, 6 W. & S. 466.

(5) Morr. 2290; affirmed H. L., 6 Pat. Apps. 724.

(6) Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

(7) Ibid. vol. x. p. 362.

(8) Court of Sess. Cas. 4th Series, vol. i. p. 943.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL.

Gray v. *Gray's Trustees*, 1878 (1). The case of *Glendonwyn* v. *Gordon* (2) was not a decision in the Appellant's favour, being one of those cases in which the terms of the general disposition in question itself, and of other deeds by its grantor, clearly proved that a particular estate was excepted from the operation of the general disposition, and overcame the presumption in favour of the effect of a general disposition. As to admissibility of evidence, see *Wigram's* Evidence (4th ed.) p. 18.

Certainly there were exceptions from the general rule that a general disposition conveys the whole of the grantor's heritable estate. These were (*a*) where the grantor had himself made a special disposition of a particular estate, it was held to be excepted from his general disposition on the principle that the whole of a person's testamentary disposition should be read together: *Strachan* v. *Farquharson*, 1732 (3); *Weir* v. *Steill*, 1745 (4); *Dundas* v. *Dundas*, 1783 (5); *Fleming* v. *Fleming*, 1800 (6); *Thomson* v. *Lyell*, 1836 (7). (*b*) The terms of the deed itself has been held to shew that a particular estate was not conveyed: see *Hepburn* v. *Hepburn*, 1860 (8); *Chisholm* v. *Chisholm-Batten*, 1864 (9); and (*c*) Extrinsic facts competently proved have overruled the natural meaning of the words of general conveyance; such were the cases of *Campbell* (10); *Farquharson* (11); and *Glendonwyn* (2); but the utmost result of these cases was that where, as here, no such evidence existed there was no reason why the natural meaning of the words of a general conveyance of all the heritable estate of the disponer should not receive effect.

It was impossible to assimilate the law of *England* and *Scotland* on this question of extrinsic evidence, the latter cases cited could not be reconciled with the English law of Evidence; for in *England* if you have a presumption against the ordinary words of the will, evidence is admissible to rebut it: *Taylor's* Evidence

(1) Court of Sess. Cas. 4th Series, vol. v. p. 820.

(2) Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed L. R. 2 H. L., Sc. 317.

(3) Morr. 11,356.

(4) Morr. 11,359.

(5) Morr. 15,585; on app. 2 Pat. App. 618.

(6) Morr. *voce* 'Implied Will,' Appendix No. 1.

(7) Court Sess. Cas. 1st Series, vol. xv. p. 32.

(8) Court Sess. Cas. 2nd Series, vol. xxii. p. 730.

(9) Ibid. 3rd Series, vol. iii. p. 202.

(10) Morr. 14,855; affirmed H. L. 1743; 1 Pat. App. 343.

(11) Morr. 2290; affirmed H. L. 6 Pat. App. 724.

(6th ed.), pp. 1062–3; *Hall* v. *Hill* (1); but in *Scotland* evidence is introduced to shew that the words used are not to have their ordinary meaning; and to shew what the testator's real intention was. There is no presumption in the law of *Scotland*, as the Appellant argued, for giving a limited meaning to the general terms of such a deed as here; and the reasons for putting forth the Scotch decisions cited by him, and the mode of assimilating them to the English law of evidence, breaks down.

Then as to extrinsic evidence, here the facts relied on by the Appellant to shew an intention of the grantor to except *Kintarbert* and *Crossaig*, were wholly insufficient to establish any such intention. The fact that *Lachlan M'Neill Campbell* in his general disposition is called *Lachlan M'Neill*, was very natural, for at that date he had not completed his feudal title, but in the codicil executed in 1846, when he had fully assumed the name of *Campbell*, he describes himself as such. Again, that he had other estates which were carried by the deed was immaterial, for the words of the deed would not be satisfied by passing one or two and not "all" his "sundry lands and heritages." And as to the charters of adjudication, *Lachlan* could only make up his title in the way he did, certainly he might have stopped at the destination to himself, but that was never done, and if he had done so that would not have invalidated any of the substitute destinations. On the other hand, the near blood relationship of the Respondent to the grantor of the general disposition and the provision made for her by a codicil to it, confirms the conclusion that *Lachlan M'Neill Campbell* intended his general disposition to have full effect.

[They also cited *Collow's Trustees* v. *Connell* (2).]

Mr. *Darling*, in reply.

The Law Peers having taken time to consider their judgment, delivered the following opinions:—

LORD SELBORNE, L.C.:—

My Lords, the question in this case is, whether by the law of *Scotland* general words of disposition in a *mortis causâ* deed are,

(1) 1 D. & War. 94, at p. 113.
(2) 23 Feb. 1866; Court Sess. Cas. 3rd Series, vol. iv. p. 465.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Selborne, L.C.

in the absence of any proof of a contrary intention, sufficient to pass heritable property vested at the date of the deed in the disponer, with a special destination to heirs substitute? The interlocutors appealed from, which (in effect) affirm that general proposition, were founded upon the case of *Thoms* (1), decided in the Court of Session in 1868, after much consideration, by a large majority of all the Judges; and it was admitted at the Bar that if that case was rightly determined the present appeal must fail.

It may be useful, before referring to authorities, to consider how this question would appear to stand upon principle, in the absence of authority. It is difficult, on any principle, to understand why words in a testamentary instrument descriptive of a man's whole estate, present and future (the law permitting all the present and future estate, moveable and immoveable, to be so disposed of), should, in the absence of a controlling context, be held to pass less than what they properly describe. There can be no question as to the meaning of such words; no possible extrinsic evidence can make them equivocal. Their use, *primâ facie*, excludes the supposition that the disposition was intended to be limited to some particular subjects. No reason can be suggested why a testator should be presumed, generally, to have more regard for heirs substitute, under a destination not of his own making, than for his own heirs-at-law.

By the law of *Scotland* the institute, or the heir in possession, under a settlement or entail without fetters, is absolute fiar. The property is his, it is liable for the payment of his debts, his disposition operates upon it *per directum*, and not by way of revocation, or as in the exercise of a power. The heirs substitute take only for want of a disposition by him, and they then take as heirs nominate instead of the heir-at-law. It would seem, therefore, on principle, that there can be nothing in the mere nature of such a special destination to prevent property so settled from passing by a general disposition as part of the *universitas* of the fiar's estate.

The operation of such general words may of course be limited by proof of a contrary intention; and the law of *Scotland* appears to allow such contrary intention to be proved by evidence of a

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

kind which in *England* would not be admissible for that purpose. If the testator has himself made a prior settlement, in which, after himself, there is a special destination to heirs substitute (whether such settlement is or is not contained in a proper *mortis causâ* deed), general words of disposition in a subsequent *mortis causâ* deed will not "evacuate" (as the phrase is) the destination to those heirs substitute; and the special destination will equally prevail if the settlement of the particular property is of later date than the general disposition. This may be explained upon an intelligible principle. In such a case both the instruments express the mind and will of the same person; the one as to a particular part, the other as to the generality of his estate. Every *mortis causâ* disposition of heritage in *Scotland* was, until lately, a deed, and not technically a will; and every disposition *inter vivos*, so far as it appointed heirs substitute to succeed to the disponer after his death, though it might not be technically a *mortis causâ* deed, fulfilled, in effect, the same office. There was nothing, therefore, inconsistent or unreasonable in reading and construing two such instruments together, and treating the general as subordinate to and exclusive of the particular intention, the effect of which was to make the general words residuary in their operation, as they would have been if the particular disposition had been found in the same instrument.

There are, it must be admitted, some authorities which go further than this, and in which it has been held that a testator's intention to use general words, in a *mortis causâ* disposition, in a sense exclusive of a particular subject, may be manifested by his accession to or concurrence in a settlement of the same subject by a predecessor in title, or by other acts shewing that he regarded lands destined to special heirs substitute by such a settlement as beyond the scope of his testamentary disposition. Such were the cases of *Farquharson* (1) and *Glendonwyn* (2), in which judgments to that effect of the Court of Session were affirmed by this House, the one in 1759, and the other in 1873. To attribute a force equivalent to that of testamentary declarations to acts of a

(1) March 2, 1756. Morr. 2290; and affirmed 6 Paton, App. 724.

(2) July 19, 1870. Court Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Selborne, L.C.

different kind is certainly a very considerable extension of the doctrine applicable to a disposition of the particular subject by the testator himself. But the principle of these cases also seems to be that there is a declaration, *rebus et factis*, of the testator's will and intention as to the particular subject, the only question (apart from authority) being as to the *media* of proof, by which it may be competent to establish that will and intention, as against the generality of the language of the *mortis causâ* deed.

It is more difficult to explain the case of *Campbell* v. *Campbell* (1), decided by this House in 1743, in which it was held that property which had vested in a testator, subsequently to a general disposition of all his present and future estate by a *mortis causâ* deed, under a settlement made by his son, of which he remained ignorant till the time of his death, did not pass by the general *mortis causâ* disposition, but went to the heirs substitute under the son's settlement. I am unable to reconcile that case with the later decision of this House in *Leitch* v. *Leitch* (2) in 1829, unless it be upon a distinction between words *de præsenti*, which at the time when they are used may describe (though under a general formula) specific subjects then existing and ascertained, and words *de futuro*, the application of which to any such particular subjects cannot then be in contemplation, but must remain to be determined by future and uncertain events. I cannot say that this distinction is, to my mind, satisfactory. If the two cases are not to be so reconciled, I apprehend that the authority, which is at once the more recent and the more consistent with general principles, ought to prevail.

In *Glendonwyn* v. *Gordon* Lord *Colonsay* said (3), "The point now in question was certainly not the main subject of controversy in the case of *Leitch*, and it appears not to have been there pressed in argument. Indeed, Judges of high authority have pointed out that in the case of *Leitch* the circumstances were not such as would have admitted of the application of the principle on which alone such a plea could have been maintained." I myself, on the same occasion, stated that some considerable difficulties which I

(1) June 12, 1740. Morr. 14,855; affirmed 1743, 1 Paton, App. 343.

(2) June 2, 1826. Court Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

(3) Law Rep. 2 H. L., Sc. at p. 322.

then felt about the cases of *Campbell* and *Farquharson* might be removed if those decisions could be referred to the doctrine maintained by the minority of the Judges in *Thoms' Case* (1); and I thought *Leitch's Case* (2) sufficiently explained by Lord *Colonsay's* observations. But nothing which was then said as to *Leitch's Case* (2) or *Thoms' Case* (1) was at all necessary for the decision of the appeal then before the House; and after the fuller and more exhaustive examination which the case of *Leitch* has now received at your Lordships' Bar, I no longer think it possible to distinguish it from the case of *Thoms* on the ground suggested by Lord *Colonsay*.

In *Leitch's Case* (2) heritable property was vested by a deed of settlement in trustees in trust for the settlor's wife for life, and after her death for behoof of *George Leitch*, if then living, and his heirs and assigns whomsoever in fee; or, if *George Leitch* was not then living, for behoof of *James Frisby Leitch* if then living, and his heirs and assigns whomsoever in fee; after which the settlement proceeded thus:—"And failing the said *James Frisby Leitch*, by decease before me, or prior to the death or second marriage of the said *Elizabeth Ironside*" (the widow) "then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of *Andrew Leitch*, my nephew, son of the said *George Leitch;* whom failing, for behoof of my sisters, *Christian* and *Mary Leitch*, and my nieces *Agnes* and *Jean Trokes*, equally among them, and their heirs and assignees." The trustees were then ordered and appointed, immediately on the death of the widow, to dispone and convey, in the first case to *George Leitch* in fee; in the second case to *James Frisby Leitch* in fee; and in the third case "to dispone the said lands to and in favour of *Andrew Leitch*, my nephew; whom failing, to my sisters *Christian* and *Mary Leitch*, and my nieces *Agnes* and *Jean Trokes*, equally among them, their respective heirs and assignees." The question was whether the destination to *Andrew Leitch* vested and was transmitted by a general disposition of all his estate contained in a *mortis causâ* deed afterwards executed by him, although he died in the widow's

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

(2) June 2, 1826. Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

H. L. (Sc.)
1880
CAMPBELL
v.
CAMPBELL.
Lord Selborne, L.C.

lifetime; or whether a condition that he also should survive the widow was to be implied. It was held in the Court of Session, and by this House, that the fee vested in *Andrew Leitch*, and that it was transmitted so as to "evacuate" the ulterior destination to the settlor's sisters and nieces by the general words of his *mortis causâ* deed. That decision cannot, I think, have been right, if there is a presumption in the law of *Scotland* against the sufficiency of mere general words of disposition in a *mortis causâ* deed to pass heritable property vested at the date of the deed in the disponer, with a special destination to heirs substitute.

I have had an opportunity of referring, not only to the appeal papers in the case of *Leitch*, before this House, but also to the papers in the Court of Session, which are preserved in the library of the Society of Writers to the Signet. I find from those papers that Lord *Colonsay* was mistaken when he supposed the point in question not to have been pressed in the argument of that case. The following extract is taken from the printed argument of the settlor's sisters and nieces before the Second Division:—"A general disposition can have no further operation than a general service. Now it is clear that a general service could not defeat a substitution; it being plain that, to maintain this, would just be to say, in other words, that there could be no such thing as a substitution. The institute may in the general case defeat the substitution; but he must do so by express terms. He must indicate his intention of defeating the substitution, which he cannot do by a general deed, making no reference to the property. This seems to be the principle upon which both this Court and the House of Lords decided in the case of *Farquharson* v. *Farquharson* (1) on the 2nd of March, 1756, that a deed disponing 'all lands which should pertain to the grantor at the time of his death' was not sufficient to defeat a substitution created as to lands to which the grantor afterwards succeeded."

This argument was not, indeed, founded so much upon any alleged presumption, by the law of *Scotland*, against an intention to defeat such a substitution by general words, as upon technical reasons. "Where a person" (it was said) "grants a mere general conveyance, without applying it to any special property, there is

(1) March 2, 1756. Morr. 2290; affirmed 6 Paton, App. 724.

no method known in the law of *Scotland* by which a feudal title can be obtained to this property except through the heirs-at-law of the grantor. The general disposition is held to convey only that which would otherwise have been claimed by the heirs-at-law. The general disponees have a mere equitable title which they can make effectual and convert into a legal title, solely by the intervention of the heirs-at-law. But it is perfectly clear that where there is a proper substitution, the heirs-at-law of a person deceased can never, by means of a service or any other proceedings at their instance, defeat the substitution." In the Appellants' printed case before this House these technical reasons were, in effect, repeated. The whole argument founded upon them was rejected by the Court of Session and by this House; and it is hardly conceivable that it would have been put in that form if any such general presumption or rule of construction as that now contended for had been then known to the legal profession in *Scotland*.

The distinction suggested by the minority of the Judges in *Thoms' Case* (1), to which Lord *Colonsay* referred with some approval in the case of *Glendonwyn* (2), and which was again pressed upon your Lordships in the present case by the Appellants' counsel, was that the settlor's sisters and nieces were not heirs substitute, but were conditional institutes, who were only to take if the property never vested in *Andrew Leitch*. It is clear, however, from the papers that *Leitch's Case* (3) could not have been decided upon any such ground. The printed case of the Respondents (the disponees in trust of *Andrew Leitch*), both in the Court of Session and in this House, contained this passage:—"The Appellants next demanded whether the heirs-at-law of *Andrew Leitch* could have preferred any claim to the lands in the case of his death without leaving a settlement?" The answer to this is obvious: "The heirs-at-law of *Andrew Leitch* were disappointed by the substitution in favour of the Appellants, which substitution again was vacated by the conveyance of the right vested in

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

(2) July 19, 1870. Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

(3) June 2, 1826. Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Selborne, L.C.

Andrew Leitch to the Respondents his trustees." The argument at the Bar has completely satisfied me that the point would have been untenable if it had been taken. I am unable to discover any means consistent with the ordinary rules of construction and with the decision of this House, that *Andrew Leitch* took a vested and transmissible fee, though he died in the widow's lifetime, by which the conclusion that the sisters and nieces were conditional institutes and not heirs substitute could have been reached.

The result is that I think *Thoms' Case* (1) was rightly decided, and that the present appeal ought to be dismissed with costs.

LORD HATHERLEY :—

My Lords, I am of the same opinion. This class of cases has been so often before your Lordships' House of late, and it has also been so frequently and fully discussed by the tribunals below, that the question we have before us now appears to me to be of a very condensed character, and not one requiring research into the large number of authorities which in some cases may usefully be referred to.

There appears to have been at first some discussion as to the exact position of a person entitled under a destination in a course of settlements to estates, which were not fettered by the settlor with those fetters to which recourse is had in *Scotland* when it is desired by a settlor to tie up his estate, as we should call it. If there be no such fetters, it is conceded on all hands that the right of alienating the estate is absolutely vested in a person who comes into it by virtue of a destination in which he has not himself at all concurred, having simply been the recipient of the bounty (it may be) or the disposition of others. He is entitled, when in possession as fiar, absolutely to dispose of the estate, although it was so destined that that destination if left alone would have carried it on to others. He may disappoint those others, not being fettered or prevented from so doing, and if he disappoints them the fee will be conveyed, just as much as if he had conveyed away an estate which had come to him from his ancestors, or which he had purchased and acquired by his private means. That has been

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

over and over again stated by different learned Judges, Judges of eminence, who have heard these cases.

The next point, my Lords, to be considered is what is the limitation in this particular case now before us? The words are as general as can be conceived, applying not only to all heritable and moveable property which then was vested, but which at the time of his death should be vested in the person who took under the disposition I have referred to, which was made by General *Campbell*. That being so, having words which are quite sufficient, *per se* (subject of course to the main question which arises here), to displace the interest created under the previous settlement, and to substitute those interests which were created by the general disposition subsequently made, or, in other words, to evacuate, as it is expressed in *Scotland* in these cases, the special destination before made, there remains this question, whether or not, in order to arrive at that result, anything is required in addition to those words which are in themselves sufficient, if they had full operation unfettered by any rule of law, or any rule of construction introduced into the consideration of deeds of this character. Whether there is any *onus* imposed upon those who claim under the general words of disposition in defeat of the particular destination, to shew such to have been the second settlor's intention: whether it ought not rather to be taken to have been his intention to use the words in the plain meaning in which, according to their ordinary understanding, a man would have used them to effectuate his purpose, or whether, upon evidence which owing to a rule of law is admissible in *Scotland*, they are shewn to have been used with a different intent. With regard to shewing that intent, the law of *Scotland* differs considerably from the law of *England*, which would not have admitted many classes of evidence, which have been shewn to have been admitted in *Scotland*, in order to prove the intention to have been this or that on the part of the second settlor independently of the words he used.

This appears to be the point to which cases of this class have been ultimately brought down. I will quote from one or two cases which were mentioned in the course of the argument, and which are set forth in the Respondent's case at page 21. With

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Hatherley.

regard to Lord *Curriehill's* views upon the subject I will quote a passage from a decision of that learned Judge. "The same Judge" (that is Lord *Curriehill*) " in a prior case, *Callows' Trustees* v. *Connell and Others*, 23rd of February, 1866 (1), where the effect of a general disposition to convey a particular estate was argued but not decided, as it was held that the estate was effectually entailed, made the further important statement:—'The other question whether or not the trust deed would have included these estates, supposing the power to have existed' (that is the power of disposal) 'is a question of construction of that deed. It is one on which I have felt great difficulty, and I have changed my opinion on it in the course of the discussion. I think the question was scarcely put to us in the right point of view. It was put as a question whether the truster intended to convey these estates. But the words, taken literally, are quite sufficient to carry everything that belonged to him.'" (It is the same in the present case.) "'They *primâ facie* included the entailed estates which confessedly belonged to him, if he had power to dispose of them; and therefore I think the proper point of view in which to regard the question (on that assumption) is, whether he intended to exclude these estates from the general conveyance. But such a general disposition, when occurring in gratuitous and in *mortis causâ* settlements, has been frequently subject to a different construction. When such words occur in an onerous conveyance *inter vivos*, as, for instance, in a trust deed for behoof of creditors, there is no doubt that they would carry all that the party had the power to convey.'"

Your Lordships will observe that there is a reference to what Lord *Curriehill* says in a subsequent case, which entirely leads to the construction which the Respondents have maintained at the Bar, and which was the last decided by the Court below. It was a case in which there was a considerable difference of opinion, though a very large majority of the Judges were in favour of the view that the *onus* was on those who attempted to prove the exclusion. In that case they say Lord *Curriehill* expressed a somewhat different view from that which he stated in the passage I have read; and Lord *Colonsay* in that case, in which it was neces-

(1) Court of Sess. Cas. 3rd Series, vol. iv. p. 465.

sary to discuss all the previous cases, made use of this expression. —I quote from the Respondent's case (1): "With regard to the second class of cases, where the disposition with a special destination had been made by a former proprietor, but was unprotected by any prohibitory or fettering clauses, Lord *Colonsay* remarked that in these also the question was one of intention or presumed intention, but he added 'There has indeed of late been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances going to shew that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination.'" Then Lord *Colonsay* adds, "Without at present discussing that debateable proposition, I go on to observe that the judgment of the majority in the case of *Thoms* was given subject to the necessary qualification that reference might be made to circumstances outside the deed to rebut the presumption; and that each case is circumstantial, and to be ruled by its own specialities.'"

I gather from the observations made by the learned Judges, especially by Lord *Colonsay*, that it is a "debateable proposition" where the *onus* lies (and a good deal depends upon that in many cases perhaps), whether it is on those who claim under the general disposition to shew that that was the intent of the disponer, or whether it lies on those who claim under the previous destination to shew that they were intended to be excluded. It appears to have been considered a dubious proposition, but in each case, as the learned Judges remark, the matter is open for consideration upon the evidence.

Now, my Lords, that evidence certainly goes a great deal further than any evidence of an at all approximate character is permitted to go in this country. In this country there are cases where the Judge is entitled, if I may use a familiar expression, to seat himself in the chair of the testator, making his will, to know

(1) At page 34, letter B, see also Law Rep. 2 H. L., Sc. at p. 321.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Hatherley.

all the facts and circumstances that he knew, and if there arises any doubt *dehors* the instrument—not in interpreting the instrument, but *dehors* the instrument—as to what the particular descriptions of property may be to which the instrument refers, then the Judge avails himself of that knowledge, just as the testator could of course have availed himself of that which was within his own cognizance with regard to the disposition of his own property. Not infrequently cases have arisen in *England* which perhaps would look as if they approached this case more than others do, but they do not really approach near to the same latitude of evidence. I refer to cases of persons having estates belonging to them, some of which are held in fee simple, and others held under a power of appointment, and such a person making as a testator a disposition of his property, and by the words "my estate," or the like, intending to pass his interest. If he uses words of gift, not words of appointment, the question arises whether or not the words of gift apply to the subject matter which he clearly and plainly describes in the instrument he is executing (the will or the like); whether he has any estates of the description so described in reality in his own ownership. If he has not, if he gives, in plain and definite terms, "my house" so and so "in which I am living," with a clear and definite description of it, and it is found that that house is not his house in the sense of being his property, but only his house as being subject to a power, then the Court thinks there is nothing to answer the gift at all, because that property did not belong to the testator; and in such cases as those, the Court has at times said they will apply to that which he clearly wished to pass, namely, the house in which he was living, those technical words of appointment which he has not himself used. But this you will observe is entirely without any evidence *dehors* the instrument beyond the mere evidence to shew what is the character of the property he has referred to in his will, and to ascertain what is the title of the property referred to in his will as to which he has expressed in an informal manner an intention to give that class of property belonging to him. The point upon which evidence is received is, does the will refer to that class of property over which he has an absolute power of disposition, or does it refer to that class of

property over which he has only a power of appointment? There are cases of election which are treated in the same way, where the person gives what really belongs to another. There the same sort of result has been arrived at by extrinsic inquiry *dehors* the will. I hardly know any cases that go further than this in that direction. It is not an inquiry to explain the will, but merely to explain what it is that passes by the will by ascertaining the only property to which it could possibly have any reference whatever.

My Lords, this case is very different indeed. This person, as is conceded by all the learned Judges, had power to dispose of the property absolutely as his own, just as much as if it was his own house from the beginning. He makes a general disposition by which he changes the destination, as he might have done at any time he pleased, and he gives that property with all his other property, heritable and moveable, in a mode which displaces that previous disposition by general words.

My Lords, I need say no more as to the point to which the matter seems to be brought by decision until we get to the case of *Leitch* v. *Leitch's Trustees* (1). The other cases may have had specialties in them which I need not enter into. My noble and learned friend on the woolsack has fully classified the different conditions under which property thus disposed of generally may be viewed, according to whether it is found in the second disponer as taking under the first disposition, or was acquired by the second disponer by some other means. All these points have been carefully gone into by my noble and learned friend on the woolsack. Then one comes to the case of *Leitch* v. *Leitch's Trustees* (1), which, contrary to the view which Lord *Colonsay* entertained of it, has been found by the research which has been made by my noble and learned friend to have a clear and distinct bearing upon the question we have before us, a bearing which seems to favour (no contrary case having been cited which contradicts it) the view that when a general disposition is made large enough to carry everything that the disponer, whoever he may be, may have power to dispose of, it is not for those who question the effect of that general disposition to put the persons who claim under it upon proving that it was intended to do that which the words do.

(1) Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Hatherley.

The words have that effect, and a person is supposed to have intended that which he has expressed by his words. The peculiarity of the law of *Scotland*, differing from the law of *England*, is that under certain circumstances, which I need not enter into in detail, the Court may be led to hold that those words have a different effect from that which they were undoubtedly intended to have, and exclude a particular part of the property which otherwise they would include. That may be so, otherwise the solution would be very simple.

It only remains then to consider the question whether or not that second point has been at all established by any evidence brought before us in this cause. The authorities which have preceded this case have led me to the conclusion that there is no *onus* incumbent upon those who claim under the general disposition to shew that it was intended to evacuate the previous destination, but that the *onus* is the other way. It is on those who say that it was not evacuated to shew the testator's intention in some way to exclude it from those words which otherwise would include it. A few points, but very few, have been raised bearing that way, and I do not think it is necessary to enter into any detail upon them, because, in the first place, the greater part of them have been touched upon by my noble and learned friend on the woolsack, and, in the second place, I have had an opportunity of seeing the valuable opinion which will be expressed to your Lordships by my noble and learned friend who will succeed me in giving his view upon the case, and therefore I think it is scarcely necessary for me to enter into any detail at all upon the subject. But certainly some of the points seems to me to have very little weight in the consideration of a case of this kind.

One point was I think similar in its first aspect though not in reality, to the cases I referred to upon powers and instruments taking effect under the doctrine of election in the English Courts. One case was cited in which there was the circumstance that the second disponer, as I have called him all through, had no other property than that which was carried by the destination; but I do not think that that had any effect upon the decision of the cause, because it was conceded in deciding the case that it had to be decided upon the question whether or not it was intended by

the testatrix to reverse that disposition of her property which had previously been made by way of a particular destination by her predecessor in title. I do not think that when that case comes to be looked at, it will be found that any weight was given to the particular circumstance that she had no other property.

Here, it was said on the contrary that this Mr. *Lachlan M'Neill Campbell,* the second disponer, had abundance of other property —as much again as the estates which are involved in this suit— belonging to him in his own right independently of the property concerned in the suit now before us. But because he had a great deal more property, it does not follow that he intended to exclude this particular property from the operation of the instrument. If he intended to exclude it, it was very easy for him to do so. The words are very large, taking in everything he had to dispose of, and there is nothing that we ought to look at here as shewing that he did not intend a particular portion of that aggregate to go with the rest because it was somewhat differently situated from the remainder of the property that he was dealing with. It comes to this, there is no authority whatever cited to shew that you must take that previous destination as in itself standing before the eyes of the second disponer and read the instrument containing the previous destination as that which would induce him to hold his hand when he was making the general disposition of his property. Surely, if it was so brought before him, and there had been the least intention on his part so to do, he would have expressed it; but nothing of the sort is expressed. This being his property and capable of passing by the words he has used, he deliberately put down these words. The fact of his having two or three times as much property would make no difference in my view as to his disposing of that which he could dispose of by those words. The case is not I think one which would induce me to say that there is anything in the shape of the instruments here which leads to the conclusion that he intended this exclusion or that he intended to do anything else but what the words have done, namely, to make this destination which was present to his mind.

As regards the circumstances of the case, I really think there is nothing in them which can reasonably be considered to have a

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Hatherley.

legal effect one way or the other. If you ask what a person who was sitting down to dispose of his property unfettered by entail, might reasonably be expected to do, probably the first answer given would be that you would reasonably expect to find an alteration of the destination in favour of his near relations instead of his more distant relations. But for my own part, looking according to our English view only to the words which have been used, without making any conjecture upon the subject, I should not be disposed to receive that against those claiming under the second disposition as a proof of his intention in that respect. I think what we have to look at is the wording of the instrument he has executed.

I may make one observation which I alluded to in the argument, namely, if your Lordships' House were to hold that an instrument of this description could not be held applicable to changing a destination without a special mention of it, you would very much fetter the disposing power by will of testators who execute in *Scotland* testamentary deeds which are in the nature of wills. Many of them are executed in a man's last moments, and sometimes when he is *inops consilii*, and he does it in *England*, and probably in *Scotland* also, in a very few words in many cases. If he says "I give the whole of my property," in *England* "both real and personal," or in *Scotland* "both heritable and moveable," in a particular direction, he believes that he has given it all—he does not go over the parts of his property and think of them one by one unless he is in a very strong state of health, and that is still more likely to be the case when, instead of having his own legal adviser he has one who is called in on the spur of the moment, and who receives instructions to make a will. If the instructions referred to any definite purpose you would expect to have that definite purpose stated—and if no definite purpose were stated, but the whole of the property was directed to be given, what would be the natural construction of that but what the very words say, namely, a desire to give anything he possessed in that particular direction. And with regard to carrying that desire into effect, it appears to me to be reasonable to say that it is carried into effect unless you can shew, so far as the law of *Scotland* allows you to do so, that those words were not used in the

sense of including a particular estate which was the subject of previous destination.

How this state of things has arisen I am not able distinctly to trace, but there are steps I think recognisable in previous cases shewing what the law has approximated to, and I think there is nothing contradictory to the decision which your Lordships propose now to arrive at in the present case. Therefore we shall be free from the difficulty which will, I believe, be pointed out by my noble and learned friend who will succeed me, and which I should admit to be a very great one indeed if it existed, namely, the difficulty of disturbing any practice of conveyancers which may have arisen. This House has not been slow to recognise the importance of that consideration in many cases,—in one not long ago, and in others at different times,—and many decisions of this House have been founded upon the law and practice of conveyancers. Lord *Eldon* said from time to time that he never could think of hastily entering upon a course of decision which would shake perhaps a very large proportion of the titles on which landed property throughout the kingdom was held. The greatest respect is therefore due to the opinion of conveyancers, but I do not think we have had even the usual number of citations from text-writers in this case, and I do not think that any authority decided by the Courts has gone counter to the conclusion at which I have myself arrived, namely, that it is not proved in this case that the general disposition did not evacuate the previous destination contained in the first instrument. Therefore, my Lords, I entirely concur in the motion which my noble and learned friend has made.

LORD BLACKBURN:—

My Lords, in this case two questions are raised as to the effect of the testamentary disposition and settlement of *Lachlan M'Neill* on the succession to a considerable landed estate in *Scotland*.

It appears that by the settlement of General *Campbell* this estate was destined to *Lachlan M'Neill* and the lawful heirs male of his body, whom failing, to *Dugald M'Neill* (*Lachlan's* brother) and the lawful heirs male of his body, whom failing, to cousins in succession. And it is not disputed in this case that if that

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Blackburn.

destination still regulates the succession to the lands, the Pursuer, *Isabella*, who is the sister of *Lachlan* and *Dugald*, and their heir-at-law, does not take as an heir of provision under the General's settlement. There were no prohibitory clauses in the General's settlement. General *Campbell* died in 1837, and it is not disputed that *Lachlan* from the time of the General's death was fiar in the estate, and had as complete power to dispose of it by a testamentary disposition to the disinherison of his heirs of provision as he had to dispose of lands which he held as fiar, which would have gone to his heir-at-law, to the disinherison of that heir-at-law.

Lachlan executed the settlement in question after he had succeeded to the destined lands. It is not necessary to read it. It is not disputed that this settlement was duly executed, and that the general words may be sufficient to pass the destined lands, as well as those not destined. The Appellant's contention is well expressed in his case: "The subjects disposed of are described in language entirely general, and enumerative of the several categories of property known in Scotch law. The first and most generally important question which the deed gives rise to is whether its general terms can be held to be directed to include *Kintarbert* and *Crossaig*, landed estates already settled upon a destination of heirs. The Appellant submits that they cannot. It is decided in Scotch law that such a general disposition does not comprehend estates which have been already settled on a line of heirs by a previous deed of the same proprietor. The Appellant maintains that the like rule applies when the existing destination is settled, not in a deed of the same grantor, but in the deed under which he has himself taken the estate. Without entering in this supplementary statement into any examination of the authorities it may be sufficient at present for the Appellant to state that the judgment against which he appeals was rested by the learned Judges in the Court of Session entirely upon a decision of that Court in 1868, viz., *Thoms* v. *Thoms* (1). That decision was not submitted to the review of your Lordships' House. In the most recent case in which the general question now raised was under the consideration of your Lordships' House, the rule laid down in *Thoms' Case* was doubted by both the noble and learned Lords who

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

gave detailed opinions. The Appellant is to maintain to your Lordships that mere general words purporting to dispose of a man's whole property in a will or *mortis causâ* deed, must, unless there be something in the instrument itself to control that presumption, be understood of property the succession to which, after the death of the testator, is not already regulated by a prior instrument, either made by the settlor himself or under which he holds."

My Lords, the case of *Glendonwyn* v. *Gordon* (1) has been so recently and so fully brought before your Lordships' notice that I think it not necessary to read the judgments, which must be fresh in your recollection. Lord *Colonsay*, as I understand him, gives a decided opinion, based on decisions in *Scotland*, and in this House in appeals from *Scotland*, that general words, such as those in this disposition, may or may not carry an estate which is subject to a simple destination, and that whether they do so or not was to be determined not merely by construing the words of every part of the will, and receiving all such evidence of surrounding circumstances as tends to shew what the words were used about, and as aids in their interpretation (evidence of that class which Sir *James Wigram*, in his Treatise on Extrinsic Evidence, calls "explanatory evidence" (2)), which would be received in an English case and according to English law, but also by evidence of subsequent deeds and dealings in respect to the property shewing what the disponer's intention really was, whether the words expressed it or not (being evidence of that class which Sir *James Wigram* calls "evidence to prove intention") which latter class of evidence (unless in the exceptional case of a latent ambiguity) is not admissible in an English case and according to English law. In the course of his argument Lord *Colonsay* (3) cites and relies on *Thoms* v. *Thoms*, stating that the Judges in the majority in that case recognised as a general principle that each case was ruled by its own specialities, and whose opinions therefore support the general position which he had before laid down in these terms: "There has indeed of late

(1) July 19, 1870. Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

(2) At pages 9, 10.

(3) Law Rep. 2 H. L., Sc. at p. 323.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Blackburn.

been difference of opinion as to whether the mere existence of the previous destination unaltered does, without aid from other circumstances, raise in this class of cases a presumption that the general words were not intended to apply to the particular estate so previously destined. But there does not appear ever to have been any difference of opinion as to the competency of resorting to external circumstances going to shew that the general disposition, notwithstanding the comprehensiveness of the language, was not meant or intended to displace the prior special destination."

He then intimates pretty clearly that he was not at present inclined to agree in the conclusion come to by the majority in *Thoms* v. *Thoms* (1); and his opinion, though not the ground of his decision, is a weighty authority. But he declines to enter on what he calls "that debateable proposition," and finally gives as his *ratio decidendi*: "Therefore even if it should be thought that in this class of cases the presumption is in favour of the general disponee, I think that the circumstances I have referred to are quite sufficient in this particular case to rebut that proposition."

My Lords, before proceeding further, I may say that (perhaps in consequence of the prejudice naturally instilled into me by my education now for more than forty years as an English lawyer) I cannot but think that the English rule is both more convenient and logically more consistent with the principle on which the previous communings between the parties are not received to construe a written contract. This was decided in your Lordships' House, in *Inglis* v. *Buttery* (2), to be the law of *Scotland*. It was not then new law in *Scotland*, and is indeed very clearly enunciated by Lord *Gifford* in the passage cited by me in *Inglis* v. *Buttery* (3). I therefore sympathise completely with the wish expressed by the Lord Chancellor (Lord *Selborne*) in *Glendonwyn* v. *Gordon* (4), that your Lordships could have based your judgment in that case on some ground which would have prevented such "evidence to prove intention" from being admissible in *Scotland*, even in such a case as this. But, my Lords, I think

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.
(2) 3 App. Cas. 552.
(3) Ibid. at page 577.
(4) July 19, 1870. Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

that could not be done if the Scotch authorities were such as Lord *Colonsay* thought them. The law of conveyancing in every country, in none more than in *England*, is a system of artificial law. It is of immense consequence that that law should be settled, so that those who have to advise intending purchasers or lenders as to the sufficiency of titles, should, if possible, know what the law is; and it is hardly possible to exaggerate the confusion and the mischief which would ensue if no point of conveyancing law, either in *England* or *Scotland*, which has not been finally decided in this House, were considered settled however long it had prevailed, if it appeared not to have been originally based on a sound principle. But besides this, I think that Lord *Colonsay* was justified in saying that the reception of this class of evidence in this class of cases was sanctioned by this House in *Farquharson* v. *Farquharson* (1). I say nothing as to *Campbell* v. *Campbell* (2), for I have proved quite unable to understand what was the *ratio decidendi* in that last case.

The Lord Chancellor, after expressing this wish, proceeded to point out that the Appellant was in a dilemma. Either this House in *Farquharson* v. *Farquharson* (1) acted on the evidence which it unquestionably received, or it acted upon the ground that an heir of provision under a destination was not disinherited by general words, such as would have disinherited an heir-at-law. In either case the appeal failed, and it was unnecessary to decide on which horn of the dilemma the Appellant was to be fixed. I think this was a true dilemma; but I think that it is now necessary to decide the point there left undecided, that is, in effect, whether *Thoms* v. *Thoms* (3) was rightly decided or not.

It is not, I think, disputed that unless the decision in *Thoms* v. *Thoms* (3) is overruled by your Lordships, it governs this case. Thirteen Judges were concerned in that case. Of those, three, the Lord President *Inglis*, Lord *Benholm*, and Lord *Neaves*, rested their judgment on a very able exposition by those two latter Judges of what they thought the principles of Scotch law; and Lords *Jerviswood*, *Ormidale*, and *Ardmillan*, in separate judgments,

(1) March 2, 1756. Morr. 2290; affirmed 6 Paton, App. 724.

(2) June 12, 1740. Morr. 14,855; affirmed 1 Paton, App. 343.

(3) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Blackburn.

did the same. None of those six Judges relied on the decision of this House in *Leitch* v. *Leitch's Trustees* (1): but none of them said anything indicating that they did not think that that decision involved the point. Three Lords, *Kinloch*, *Barncaple*, and *Mure*, relied on *Leitch's Case* (1) as a decision of this House on the very point, and, if so, settling the question. Lord *Deas* agreed in the result with the majority, but thought that *Leitch's Case* (1) was not a decision upon the point. Three Judges, Lord Justice Clerk *Patton*, Lord *Cowan*, and Lord *Curriehill*, formed the minority.

That decision carries with it the weight of a very great majority of the Judges; and, if it had not been questioned soon after, I should have been unwilling to shake such a decision on a point of conveyancing. For, as I said before, it is of great consequence to the interests of the commerce of land that those who are asked to advise the purchasers or lenders of money on land as to the sufficiency of a title should not be left in doubt as to what the law is. Even thirteen years would be enough to make me very unwilling to decide that a judgment on the faith of which lands might in the interval have been bought and money lent, was wrong. But enough, I think, took place in the subsequent case of *Glendonwyn* v. *Gordon* (2) to prevent the lapse of time having this effect. I think, therefore, that your Lordships should treat this as in effect an appeal from *Thoms* v. *Thoms* (3).

My Lords, I have come to the conclusion that *Thoms* v *Thoms* (3) was rightly decided. I form this opinion partly on the ground that I agree in the very able reasons of Lords *Benholm* and *Neaves*, and partly because I think that *Leitch* v. *Leitch's Trustees* (1) did involve the point, and was ill decided, unless the law was as the majority then decided, and the Respondents now contend.

It is no doubt true that it was not the point mainly argued, and that if all that was said about it by Lord *Lyndhurst* was what appears in the report in 3 *Shaw* and *Wilson*, viz., that "it was too clear for argument," the very great difference of opinion in *Thoms* v. *Thoms* (3) is a curious comment on his judgment. But in

(1) June 2, 1826. Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

(2) July 19, 1870. Court of Sess. Cas. 3rd Series, vol. viii. p. 1075; affirmed Law Rep. 2 H. L., Sc. 317.

(3) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

justice to Lord *Lyndhurst*, it should be observed that we have not all he said. He had, at the end of the argument, expressed his views, and unfortunately we have no report of what he then said; he postponed judgment to examine the papers more thoroughly, and what we have in the report is merely what he said on the second occasion to the effect that he had not changed his formerly expressed opinion.

Taking this view of the matter I think it unnecessary to examine any of the authorities prior to *Leitch* v. *Leitch* (1), nor to examine any of the cases subsequent to *Thoms* v. *Thoms* (2). I cannot state the case of *Leitch* v. *Leitch's Trustees* (1) better than is done in the Respondent's case, page 13. "In that case the estate of *Kilmardinny* was conveyed by a *mortis causâ* disposition of its proprietor, *John Leitch*, to trustees in trust for '*Elizabeth Ironside*, my wife, in case of her surviving me, in liferent for her liferent alimentary use allenarly during the time of her life, and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of the said *George Leitch*, my brother, and his heirs and assignees whomsoever, in fee, in case he shall survive me, and shall be in life at the time of the death or second marriage of the said *Elizabeth Ironside*; and failing the said *George Leitch*, by decease before me or prior to the death or second marriage of the said *Elizabeth Ironside*, then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of the said *James Frisby Leitch*, my nephew and his heirs and assignees whomsoever, in fee, in case he shall be in life at the time of the death or second marriage of the said *Elizabeth Ironside*; and failing the said *James Frisby Leitch*, by decease before me or prior to the death or second marriage of the said *Elizabeth Ironside*, then I appoint the said trustees to hold the foresaid lands and others in trust for behoof of *Andrew Leitch*, my nephew, son of the said *George Leitch*, whom failing, for behoof of my sisters *Christian* and *Mary Leitch*, and my nieces *Agnes* and *Jean Trokes*, equally among them, and their heirs and assignees.' There was also an express direction applic-

(1) June 2, 1826. Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

(2) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Blackburn.

able to the event which, as will be presently noticed, occurred, that in case of the death of the two first heirs called *George* and *James Frisby Leitch*, 'before me or before the death or second marriage of the said *Elizabeth Ironside*, then I appoint the said trustees to dispone the said lands to and in favour of *Andrew Leitch*, my nephew, whom failing, to my sisters *Christian* and *Mary Leitch*, and my nieces *Agnes* and *Jean Trokes*, equally among them, and their respective heirs and assignees.' *George Leitch*, the brother, and *James Frisby Leitch*, the nephew of the trustee, pre-deceased his widow, and therefore, by the terms of the deed, took no right under it. His nephew *Andrew Leitch* survived *James Frisby Leitch*, but died in February, 1821, survived by the truster's widow, who died in November, 1823, without entering into a second marriage. *Andrew Leitch* executed a general *mortis causâ* disposition in October, 1820, of all his estates and effects, which did not specify the estate of *Kilmardinny*. On the death of *John Leitch's* widow, that estate was claimed by the trustees of *Andrew Leitch*, as carried by his general disposition, and by the sisters and nieces of *John Leitch*, as heirs substitute under the special destination in *John Leitch's* trust disposition. The Lord Ordinary preferred the heirs in the special destination. The Inner House recalled his judgment, and preferred the trustees of *Andrew Leitch* as the disponees under his general disposition. The House of Lords, on appeal, affirmed this decision. In the argument of the Appellant it was expressly pleaded '*Andrew's* general conveyance, not referring specifically to the lands of *Kilmardinny* cannot exclude the subsequent substitutes in *John's* disposition of that estate;' to which the Respondent replied, 'The disposition executed by him was sufficient to transfer his right to the Respondents, and excludes the sisters and nieces as substitutes.'"

The question mainly argued was no doubt this: whether *Andrew* took a vested interest of any kind during the life of the widow? The decision was that he took a vested interest of inheritance of some sort, and that his interest, whatever it was, was transferred by the general words of his disposition. If what *Andrew* took was a fee as institute, subject to a destination to the ladies as substitutes, the very point was decided. It could hardly

have been overlooked, for the Lord Ordinary, though he based his judgment mainly on the ground that in his opinion the trust for *Andrew* was in effect governed by the previous words, "in case he shall be in life at the death or second marriage," though they were expressed as relating only to the previous gifts, yet he did state, as a second ground, that the general words were not sufficient to evacuate the destination to the ladies as heirs substitute. Very little was said as to this last point in the Court below. The three Judges who formed the minority in *Thoms* v. *Thoms* (1), and Lord *Deas*, who on this point agreed with them, thought that the true construction of *John Leitch's* settlement was that the trust was in favour of *Andrew* and his heirs-at-law, and that the ladies were never to take anything at all under the disposition unless *Andrew* predeceased the truster. For if *Andrew* had died an hour after the truster, his vested fee would have gone to his heir-at-law, and as he had uncles, the ladies, who were his aunts, could not take in that capacity. This could hardly be *John Leitch's* wish. I cannot find, either in the report of the case of *Leitch* v. *Leitch* (2), or in the papers laid before this House, any trace of this construction of the disposition having been suggested. I cannot, in the absence of anything to shew it, presume that the Court below, or the House of Lords, put such a construction on the trust disposition, which, as it seems to me, would have frustrated the truster's intentions.

There remains a second question, namely, whether there is in this case any such evidence as would be admissible to prove, and of sufficient weight to prove, that the testator *Lachlan* did not intend to give the destined estates by those general words.

This I may treat very shortly. I think, therein agreeing with all the Judges below, and I believe with all your Lordships, that none of the matters relied on in the Court below was of sufficient weight. One point not made below, because not then noticed, was made at your Bar, arising on the mode in which *Lachlan M'Neill* made up his titles without noticing the new testamentary disposition which still remained in his own hands, and was revocable at his pleasure.

(1) March 30, 1868. Court of Sess. Cas. 3rd Series, vol. vi. p. 704.

(2) June 2, 1826. Court of Sess. Cas. 1st Series, vol. iv. p. 659; affirmed 3 W. & S. 366.

H. L. (Sc.) 1880 CAMPBELL v. CAMPBELL. Lord Blackburn.

I apprehend that his agent, even if he knew of this disposition and had it in his hands, ought in the absence of express directions to keep it secret; and if he had noticed it in making up the titles, would have done wrong, and probably, if *Lachlan* afterwards revoked his disposition, would have caused some trouble. I do not therefore see how this mode of making up the titles can afford any inference that he did not intend to affect these lands by his disposition.

I, therefore, come to the conclusion that the appeal should be dismissed with costs.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 8th July, 1880.

Agents for Appellant: *Wright, Bonner, & Wright.*
Agent for Respondent: *W. A. Loch.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1880 *July* 12.

WILLIAM DIXON, LIMITED, AND OTHERS. APPELLANTS;
CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES. RESPONDENTS.

Railway—Mines and Minerals—Statutory Notice to purchase by Railway Company—Railways Clauses Consolidation (Scotland) Act, 1845, (8 & 9 *Vict. c.* 33), *ss.* 70, 71, 72.

Though a mine owner may give notice under the statutes 8 & 9 Vict. c. 20, and c. 33, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter-notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing.

By the 70th section of the *Railways Clauses (Scotland) Act*, 1845, the minerals under a railway remain the property of the owner of the land, unless they are expressly purchased by the company.

The 71st section provides that if the owner or lessee of minerals not purchased by the company is desirous of working them, he shall give the company notice in writing of his intention to do so thirty days before the commencement of working. Power is given to the company "on the receipt

16 C.L.D. 563.
20 C.L.D. 553. 560. 561.
11 Q.B.D. 823.

of such notice" to inspect the mines, and if they are desirous that such mine or parts thereof should be left unworked, and if they are willing to make compensation therefor, they are empowered to give notice to that effect. If such notice is given, then it is declared that the owner or lessee shall not work the mines or minerals comprised in such notice.

The 72nd section provides that if before the expiration of such thirty days the railway company do not give notice of their desire to have such mines left unworked, it shall be lawful for the owner or lessee to work the said mines in such manner as such owner or lessee shall think fit for the purpose of getting the minerals contained therein.

A. and *B.* were the lessees of the minerals, viz., limestone, under a railway passing through *Caldwell*. They, on the 8th of July, 1878, gave notice in terms of the above sections to the proprietors of the railway that they were desirous of working, and intended to work, the "mines and minerals including limestone" lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to *A.* and *B.* of their desire to have such mines and minerals left unworked, but they did give such notice on the 20th of February, 1879, offering compensation for the limestone unworked. *A.* and *B.* contended that the notice of the 20th of February, 1879, was too late to prevent them working out the limestone; such notice to be valid required to be given before the expiration of thirty days from the date of their notice of the 8th of July, 1878 :—

Held, affirming the decision of the Court below, that the notice of the railway proprietors was valid.

Held, also, that the incidental *dictum*—that after thirty days had expired the time had passed for the railway proprietors to give a counter-notice—in *Smith* v. *Great Western Railway Company* (3 App. Cas. at p. 182) was no judicial authority here, being said where it was in no way material for the decision, and where the point could not have been fully argued; no counter-notice having been given in that case.

APPEAL from a judgment of the Second Division of the Court of Session.

The Appellants, *William Dixon, Limited*, are the lessees of certain minerals, viz., limestone rock, on the estate of *Caldwell, Renfrewshire*, under lease dated Whitsuntide, 1870. The Respondents, the *Caledonian and Glasgow*, and *South Western Railway Companies*, are the joint proprietors of the *Beith Branch Railway*, which passes through the estate of *Caldwell*. The Respondents purchased in 1866 the land occupied by the railway so far as passing through the estate; but the mines and minerals were not expressly purchased by them. The question in this appeal arises mainly under the 70th, 71st, and 72nd sections (1) of the *Railways*

(1) Substantially the same as the 77th, 78th, and 79th sections in the English statute, 8 & 9 Vict. c. 20.

H. L. (Sc.) 1880

DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.

Clauses Consolidation (Scotland) Act, 1845, which are substantially as follows:—

(70.) The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, ... unless the same shall have been expressly purchased, &c.

(71.) If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines or any parts thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works or within the distance aforesaid which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, ... and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

(72.) If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein; and if any damage or obstruction be occasioned to the railway or works by the working or getting of any such minerals which the company shall so have required to be left unworked, and for which they shall so have agreed to make compensation, the same shall be forthwith repaired or removed, as the case may require, &c.

Some years ago the Appellants commenced to work the *Caldwell* limestone; and in March, 1877, their workings reached to within forty yards of the Respondents' railway. After verbal communings it was agreed by the Respondents, by letter dated the 2nd of May, 1877, to allow the limestone to be "worked up to within ten feet of the centre of the line of rails," adding, "that when the working came up to that point both parties will see

clearly the exact position of matters, and be better able to decide as to future operations." Under this arrangement the work proceeded until the month of June, 1878, in the course of which month the Appellants' workings had at one or more points been carried up to within ten feet of the centre of the railway.

The Appellants, under their lease, have right to work the limestone either by open cast works or by mines, and for some years they have been in the practice of working it by the former method. It is alleged that it has always been a question between the parties, whether the Appellants were entitled to pursue those open cast workings under and adjacent to the railway, with the result of destroying the surface of the railway.

The Appellants, on the one hand, claiming the right to continue their open cast workings without restriction; and the Respondents, on the other, disputed this right, contending that the Appellants were bound to take to mining near the railway, and leave enough limestone to form a support for the line. The working in some places having approached to within ten feet of the railway, and this question being still unsettled, the Respondents, for the purpose of obtaining a judicial decision upon it, presented a note of interdict and suspension (which is not this action) by which they sought to have the Appellants interdicted from, *inter alia*, quarrying, by means of open cast workings, any portion of limestone situated under the *Beith Branch Railway*.

This litigation continued over several months, and was not finally decided until the 11th of February, 1879, in favour of the Appellants. But while it was still proceeding the Appellants, on the 8th of July, 1878, in terms of the 70th and subsequent sections of the *Railways Clauses Consolidation (Scotland) Act*, 1845, gave notice to the Respondents that they were desirous of working, and intended to work, "the mines and minerals including limestone," lying (as far as concerns this case) under the railway, and intimated that if the Respondents did not, within the period of thirty days, give notice that they desired that "such minerals or parts thereof" should be left unworked, and that they were willing to make compensation for such minerals, they (the Appellants) would work them out.

The Respondents did not give any counter-notice that they

H. L. (Sc.) 1880 DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.

desired the limestone under the railway left, until after the above-mentioned litigation as to the right of the Appellants to work by open castings was concluded on the 11th of February, 1879. Being unsuccessful in that action, they, on the 20th of February, 1879, gave the Appellants notice that they desired the limestone under the railway, within certain limits therein specified, should be left unworked, and that they were willing to make compensation therefor.

The Appellants refused to recognise this notice as a valid or competent statutory notice, on the ground that it had not been given within thirty days from the date of their notice of the 8th of July regarding the same minerals; and therefore that the Respondents had, through their own fault, lost their right under the statute to give any such notice at the time they did so.

They, however, expressed their willingness to consider any terms which the Respondents might be inclined to offer them as compensation for leaving the minerals. The Respondents refused to submit any offer, except on the basis of their notice of the 20th of February being treated as a valid and subsisting notice under the statute; and in order to prevent the Appellants proceeding with their workings, and to try the question of the validity of the notice of the 20th of February, 1879, the Respondents presented the note of suspension and interdict against the Appellants, which has given rise to this appeal.

The Lord Ordinary (1) pronounced an interlocutor on the 18th of June, 1879, refusing the interdict sought. Against this decision the Respondents reclaimed; and the Lords of the Second Division, on the 13th of November, 1879, recalled the Lord Ordinary's interlocutor, and interdicted the Appellants from working certain parts of the minerals lying under and adjacent to the *Beith Branch Railway*; holding that the notice of the 20th of February, 1879, was effectual; being of opinion that the object and limitation of the thirty days was that the minerals cannot be worked for that period after notice is given; but that after that time the question comes to be one of compensation only, and if the railway company resolve, at any future time, to take the minerals in order to preserve their line, and pay compensation, their notice to

(1) Lord *Adam*.

that effect is sufficient to prevent the mineral owner going on working (1).

On appeal,

July 9, 12. Mr. *E. E. Kay*, Q.C., and Mr. *Chitty*, Q.C., contended for the Appellants that the meaning of the limit of thirty days in the 72nd section of the statute was that if the railway proprietors did not give a notice within that time that they desired the minerals unworked, then the Appellants had a positive liberty to work the minerals, just as if the railway was never made. This interpretation threw no hardship on the railway proprietors, for having neglected to give a counter-notice, they now either would have to deal with the mineral owner without compulsory power of purchase, or deviate their line.

The Appellants' notice admittedly did set out their intention to work the "mines and minerals, including limestone," under the railway, though they had only the right to the limestone; but no question had been raised in the Court below as to the notice not being sufficiently clear, and therefore that point could not now be raised. This was a case of sale by compulsory compensation, and therefore must be construed strictly as to time within which it could be done: see *Brooke* v. *Garrod* (2).

They further relied on the dictum of Lord *Cairns* in *Smith* v. *Great Western Railway Company* (3); although that *dictum* was not necessary for the decision of that case it was a strong authority. Lord *Cairns* there said that if "Mr. *Smith's* notice was to be held a good notice entitling him to work as to the ironstone, the time had passed for the railway directors to give a counter-notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone."

Their further argument fully appears from the opinions of the Law Peers.

[They cited *Wyrley and Essington Canal* v. *Bradley* (4); *Dudley Canal Navigation* v. *Grazebrook* (5); *Stourbridge Navigation* v. *Earl of Dudley* (6); *Great Western Railway Company* v. *Fletcher* (7);

(1) 17 Scot. Law Rep. 102; Court of Sess. Cas. 4th Series, vol. vii., p. 216.
(2) 2 De G. & J. 62.
(3) 3 App. Cas. 165, at p. 182.
(4) 7 East, 363.
(5) 1 B. & Ad. 59.
(6) 3 E. & E. 409; 30 L. J. (Q.B.) 108.
(7) 5 H. & N. 689.

H. L. (Sc.) 1880

DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.

Birmingham Canal Company v. *Earl of Dudley*, affirming *Birmingham Canal Company* v. *Swindell* (1).]

Mr. *Benjamin*, Q.C., and Mr. *Mackintosh* (of the Scotch Bar), appeared for the Respondents, but were not called on.

LORD SELBORNE, L.C.:—

My Lords, the Second Division of the Court of Session in this case have held that the railway company is not placed by the *Railways Clauses Consolidation (Scotland) Act*, 1845, in the position of having thirty days after the receipt of a notice from a mine-owner and no more, within which to make up their minds whether they will give a counter-notice to prevent the working of the minerals under the railway and for a certain distance from it upon the terms of compensation provided by the Act.

There appears to be no authority upon this subject, unless it be a *dictum* which incidentally fell from the late Lord Chancellor in this House in the case of *Smith* v. *Great Western Railway Company* (2). Undoubtedly, the Lord Chancellor did in that case, in which no counter-notice had been given, and when the question did really not arise, and was in no way material to the decision, say this: "There is no doubt that when Mr. *Smith* gave his notice to the directors of his intention to work, he stated to them that he intended to work both coal and ironstone, and if that notice was to be held a good notice entitling him to work as to the ironstone, the time has passed for the railway directors to give a counter-notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone."

Your Lordships will, I am sure, feel great respect for any *dictum*, even when unnecessary for the purpose of the decision of the particular case with reference to which it was said, which fell from so eminent a Judge: at the same time I feel perfectly sure that that very learned Judge would be the first to maintain that a *dictum* of that kind is not to be confounded with a judicial authority, when the question cannot have been presented in argument in the manner in which it would have been if it had been the real point to be decided. At the most it indicates the *primâ*

(1) 7 H. & N. 969, at p. 980. (2) 3 App. Cas. at p. 182.

facie impression of a very eminent and learned Judge which certainly, so far as it goes, is favourable to the argument of the Appellants in this case. On the other hand we have the well-considered and deliberate opinion of three learned Judges since expressed in the Second Division of the Court of Session in *Scotland* upon the argument of the particular question as arising in this case, and that opinion differs from the view so incidentally expressed by the late Lord Chancellor.

In this case your Lordships have had the assistance of an extremely full and able argument in support of the view which the Second Division thought erroneous, and I believe all your Lordships are of opinion that the result of the careful examination of the Act of Parliament which has now taken place, is not to displace, but to confirm, the construction of that Act of Parliament adopted by the Second Division.

The matter, shortly stated, seems to stand thus:—This and all other railways made under Acts of Parliament are made, not only, perhaps I may say not principally, for the private benefit of the shareholders, but for the public benefit as furnishing lines of traffic which, from the time when the railway is made, the public have a right to use. You must, therefore, consider that in any provisions such as those now to be construed in such Acts the public interest and the private interest are impartially and justly regarded upon the one side and upon the other; and if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction, or strongly against a private person on another construction, it is I think consistent with all sound principles to pay regard to that balance of inconvenience in determining such a doubtful question of construction. Here it does appear to me that the inconvenience to the public and to the railway company (if the railway company is to be regarded apart from the public) would be most serious if, through any inadvertence, or misconception, or from any other cause consistent with good faith, the thirty days had been permitted to elapse, and if that lapse of thirty days were held upon the construction of the Act to be fatal to the power of the railway company to

H. L. (Sc.) 1880

DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.

Lord Selborne, L.C.

save the railway from destruction by afterwards acquiring the right to stop the working of subjacent minerals. On the other hand, it appears to me that no injustice, and no serious inconvenience, would occur to the mine-owner if he is liable to be stopped at any time, before the mine has been actually worked, upon the terms provided by the Act of full compensation being made for the minerals which are to be left unworked, and for all loss or damage occasioned by the non-working thereof, that compensation to be settled as in other cases of disputed compensation. In the one case the full equivalent for the value of the property of the use of which he is deprived is to be given to the mine-owner; in the other case, the railway company and the public represented by the railway company are left entirely at the mine-owner's mercy, who, if he pleases to abuse his extreme rights in an extreme manner, on that view of the case would be at liberty absolutely to destroy the railway in a manner which, possibly, might be irremediable, or if remediable at all might be remediable only after great difficulty and after a considerable lapse of time. Or, on the other hand, he might demand any terms, however extortionate, which it could possibly be worth the while of the railway company to consent to, in order to avoid the destruction of the line. If the language of the clauses is such as to justify your Lordships at all in looking at the consequences, I do not think you can hesitate to say that the balance of the considerations depending upon reason and convenience would be against any construction in *re ambiguâ* which would expose the railway company to those consequences; while, on the other hand, in any event full provision seems to be made for doing justice to the mine-owner.

My Lords, I have stated this in the outset, not by any means as supposing that those considerations would have a legitimate place in your Lordships' decision if the Act of Parliament were clear one way or the other, or if there were no question fairly arising as to its construction. But when I come to look at the terms of this Act, it does appear to me that the burden of proof is by the peculiar structure and language of these clauses thrown upon the mine-owner rather than upon the railway company, to make out

11 BD. 82
241.

that the Legislature has so ruled the case in his favour as to place the railway company and the public entirely at his mercy. For the scheme of these three clauses is this:—The first clause, section 70, says that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company a right to subjacent mines and minerals unless the same shall have been expressly purchased. I need not more particularly refer to that, and I will only add that as I understand that clause and the next there would be nothing in those sections, if they stood alone, to deprive a railway company, purchasing the surface from the owner of the land, of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favour of the landowner. The 71st section, it is admitted, would, if it stood alone, have no other effect than this, that the mine-owner before he proceeds to work any mines or minerals under the railway, or within a prescribed distance, or, if there is no prescribed distance, within forty yards from the centre line of the railway, is required to give notice of his intention to work those minerals, and if he gives that notice the company is at liberty to give a counter-notice specifying "the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation;" and if that is done the owner, lessee, or occupier is not to "work or get the mines or minerals comprised in such notice," but compensation is to be made for them as is before stated.

That clause beyond all question introduces a definition of time, but it does so for the purpose simply of determining how long the mine-owner's right of working shall be kept in abeyance or suspense. And it is important, my Lords, to observe that the manner in which it reckons time is such as is apt and appropriate for that purpose and not apt or appropriate for the opposite purpose of putting the company under the obligation of doing something within a definite period. If a notice is given, and time is to be reckoned from the date of the notice, that is an apt and reasonable mode of defining the period within which something is to be done by the person receiving the notice. But if a notice is to be

H. L. (Sc.)
1880
DIXON
v.
CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.
Lord Selborne, L.C.

given not less than a certain time before something is to be done by the person giving the notice, that is plainly apt for the purpose of suspending his power to do that act until the notice shall have been given for that period; but it does not fix a *terminus a quo* convenient for the reckoning of a time within which something is to be done by the person receiving the notice. That mode, therefore, of computing time, on the face of it indicates that the object which the Legislature had in view was to fix the period during which the right of the mine-owner is to be in suspense, and not the period within which some act is to be done by the railway company.

If it had been intended to fix the time within which the railway company must necessarily give notice or be for ever precluded from doing so, the natural place for fixing that time would have been in that part of the 71st section where the right to give the counter-notice is conferred upon the railway company. It would naturally have run thus :—"If the company be desirous that such mines, or any part thereof, shall be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they may desire to be left unworked, they shall within thirty days after the receipt of such notice, give notice to the owner, lessee, or occupier, &c." That is the manner in which you would have expected to find such an enactment, if it was the intention of the Legislature to put them under those terms. But neither in the 71st section, nor in the introductory part of the 72nd section, to which I shall presently advert, do we find any such period mentioned as thirty days after the receipt of that notice. It is not mentioned in any portion of those clauses, nor in this, which is the governing clause, as to the right of the railway company to give notice, is any time whatever fixed within which such notice must necessarily be given.

But it is said by the Appellants that you must infer that the notice is to be given, if at all, within thirty days, which must mean thirty days from the receipt of the notice, although no such period of time at all had been mentioned in the 71st section, or is mentioned in the 72nd. They say you must infer that this counter-notice of the company must be given within thirty days from the receipt of the notice, because the 72nd section is intro-

duced by these words: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines." I omit the rest for the present, though I shall have some observations to make upon it presently. Those words are perfectly consistent, sensible, and efficacious if they are understood to have only the same motive and purpose with the corresponding mention of thirty days before the commencement of the working, which we have at the beginning of the 71st section. As those words in the 71st section require a notice which is to precede the working by thirty days, so this says that when such thirty days have expired and no new notice, no counter-notice, has been given, then the suspense or abeyance of working is to come to an end, and the mine-owner will be entitled to act upon his ordinary right, as an owner of mines, to work them. My Lords, it is not true, as was suggested, that this clause if so construed is inofficious; because that which it says it shall be lawful for the owner after the thirty days to do, is to work the mines "in such manner as he shall think fit for the purpose of getting the minerals contained therein." The words which follow shew that he may work the mines without any regard to the support of the railway and the railway works by the subjacent strata. It therefore is a clause which has the most important office of taking away that right to support, which, if there had been nothing said in that section, would have remained. So construed, effect is given to every word in the clause; more effect I should say to the words, "such thirty days," which still mean thirty days before the commencement of the working, than would be given by any other construction; and no kind of necessity arises by implication or otherwise for limiting, in a manner in which clause 71 has not limited it, the time within which the company's counter-notice shall be given.

I omitted to mention the words which are interjected after "to work the said mines," namely, "or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation." If we had found the words "to work

H. L. (Sc.) 1880 DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES. Lord Selborne, L.C.

the said mines" without the addition of those later words, it might possibly have been argued that their meaning was that it shall be lawful, not merely to begin working, but to go on working, and to work out the whole of the mines, though that would have been hardly possible, considering the power to give partial as well as complete notice previously provided for. But then the power "to work the said mines" is qualified by the addition of the words "or such parts thereof for which the company shall not have agreed to pay compensation." It is manifest that, whichever way the clauses are construed as to this limit of thirty days, those words are sensible. If the company have only thirty days to give their notice in, of course their agreement to pay compensation for any particular parts must have been within the thirty days; but if the company are not limited (as by the 71st section they are not limited) to the thirty days, then those words would still be perfectly sensible; because if they have exercised the power of giving the notice under the 71st section at any time whatever as to mines not at that time already worked by the mine-owner, then they will have agreed to pay compensation, and the words "or such parts thereof" will be appropriate;—that is to say, the mine-owner will continue to have the right to work any mines as to which for the time being no notice has been given by the company, but will not have a right to work mines as to which the company shall, according to the true construction of the Act, have before that period agreed to pay compensation. The practical result of the whole is this, that after the thirty days have elapsed, the mine-owner may begin to work, and may go on working, and may get all the minerals that he can until he is stopped and intercepted by a notice as to some part of the mine.

Before I conclude I may take notice of the extreme reasonableness of provisions of that sort when we regard the nature of the case, and the kind of questions which are liable to arise in such a case. It is agreed on all hands that the Legislature did not think it desirable that a railway company should be forced to purchase a mine, or a mine-owner to part with a mine, when the acquisition of it by the railway company was not necessary for the support and the safety of the line. It does not appear that the railway

company, even when they have paid compensation, would have any power of working such mines; on the contrary, I should rather infer the reverse. In that state of things it cannot be supposed to have been likely that the Legislature should have wished to compel the company to make a premature decision when the means of forming a correct judgment as to what would be necessary for the support of the line might not be available to them. It can hardly be conceived that thirty days would necessarily be sufficient for the purpose, even with the right of inspection that was given. The circumstances of this very case furnish an illustration, because here the notice was given pending a litigation between the company and the mine-owner as to the extent of the rights of mining, and the manner in which those rights might lawfully be exercised in the absence of any notice by the company or by the mine-owner. That litigation was actually going on, and as far as it had proceeded what had been done was in favour of the company's contention, although ultimately, long after this notice was given, and long after the thirty days had elapsed, a different decision was arrived at, and it was determined that the mine-owner, if not stopped by some notice from the company, might proceed by open working in a manner *primâ facie* destructive of the surface on which the lines of railway would be laid. That question was surely one which it was reasonable to take into a Court of Justice at the time, whether it was rightly determined in the result or not; and to say that pending a question of that kind, and a litigation in which, for the time being, no decision adverse to the company had been made, but rather the reverse, the company were bound to enter into a contract, within thirty days or never, to make compensation for the whole of those minerals up to the very surface of the rails themselves, would surely, when we look at the circumstances of the particular case, not be either convenient or reasonable.

And those circumstances were of a kind which might arise in various forms as between mine-owners, generally, and railway companies. There might even be questions as to the right and title of a mine-owner to give any notice at all. There might be questions of many kinds affecting the mines, affecting the company, affecting the mine-owner, questions upon collateral agreements, such as that

H. L. (Sc.) 1880

DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES.

Lord Selborne, L.C.

which in this case is said to have existed; and the contention upon the part of the Appellants is that, although those various questions might, from the nature of the case, exist at the time when a notice of this sort was given, yet still there was a hard and fast line laid down by the Legislature which would place the railway company and the public for ever at the mercy of the mine-owner, unless, without waiting for the decision of any such questions, the company bound themselves to purchase and make compensation for the minerals which it might be necessary to leave unworked. My Lords, I do not think that it would have been a very convenient or very reasonable thing if such had been the law. If the language of the Act had been clear that way, we could have done nothing but give effect to it. But those considerations do certainly appear to shew that the opposite construction, which the Court below has adopted, and which I believe your Lordships will be prepared to affirm, is rational and convenient.

I say nothing about the notice, because it does not seem that the question of the sufficiency of the notice in point of form was made the subject of controversy in the Court below. If it had been made the subject of controversy, I own for myself I entertain serious doubt whether the notice itself was one which ought to have been held good. Under those circumstances I move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN:—

The question, I think, turns entirely upon the construction of three sections, the 70th, 71st, and the 72nd of the *Railways Clauses Consolidation (Scotland) Act*. The 70th section says, in plain and intelligible terms, that "the company shall not be entitled to any mines unless the same shall have been expressly purchased." The effect of that, if it had stood alone, would no doubt, by implication, although it is not expressly said, have been that the mine-owner would have been entitled to work his mines just as if anybody else owned the surface instead of the railway company, and would have been under the same obligations, neither more nor less, to support the surface. But the Legislature obviously thought that, although the company were not to be required to

purchase them in the first instance (and that was, no doubt, a boon to the company), the interests of the public were concerned in the safety of the railway, because life and limb and property would suffer if the railway were to fall down or sink suddenly; and, therefore, they went on to provide that if the owner wished to work the mines within forty yards of the railway, he "shall give to the company notice in writing of his intention so to do thirty days before the commencement of working." That does not in terms say, but it evidently means, that he shall not begin to work them until those thirty days have expired after the notice.

Then comes this clause: "Upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines, or any parts thereof, should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked and for which they shall be willing to make compensation, and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice." Now, stopping there, it is obvious that the notice, as far as the wording of that clause goes, might be given at any time; it does not say that the company, if they make up their minds that they wish to make compensation for those minerals, are to do so within thirty days; it says nothing of the sort. By implication, but by implication only, such a notice would be wholly inoperative after the mine owner had taken away the minerals. If the railway company were to give the notice then, and say that they were desirous of making compensation for the minerals which the mine-owner had already taken away, that would obviously be too late; but that exception only results from the notice being too late in the very nature of things. Sect. 71 leaves the time within which the counter-notice is to be given without any term or limit at all, except that it must

H. L. (Sc.) 1880 DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES. Lord Blackburn.

be before the minerals are taken away. If it had stopped there I think it would have been clear.

But then comes sect. 72, and there are two constructions, either of which may be put upon it. One is the construction put upon it by the Lord Ordinary, who says that he thinks the construction of sect. 72 is that this counter-notice may be given within the thirty days, but must not be given later—that the company have thirty days within which they may give it, and no more. If that be right of course the Appellants are right.

In favour of that construction reference is made to the only authority upon the subject at all, namely, what the late Lord Chancellor, Earl *Cairns*, said in the case of *Smith* v. *Great Western Railway Company* (1), and there the *dictum* was not relevant. He was considering whether a notice to take coal and iron, when the man who gave the notice had no right at all to the coal, but had a right to the ironstone, was a good notice or not, and in thinking about and determining that, he said that the time which had elapsed in consequence of the litigation about the coal in which the company proved to be in the right, being more than the thirty days, the time would have gone; if this notice to take the ironstone was a good notice it was too late for the company to give a counter-notice. Now it would have been quite as good, for the purpose of the argument he was then putting, if the late Lord Chancellor had said there would have been a grave doubt whether the notice then given would have been in time or not, and I do not think it can fairly be said that he paid more attention to it than to be satisfied that there was that grave doubt on the point. Looking at the section without having heard the point argued, his view at the first blush was that he thought that it did mean within the thirty days. That is an authority, and an authority of course which one does not act against without consideration; but it is not a decision at all, and I do not think it would be at all binding upon the late Lord Chancellor, Earl *Cairns*, if he were here. He would say, Upon hearing the argument I will consider whether that was right. I did say it at the moment without having heard it argued, and I consider my mind quite free to look at it one way or the other now. Still I do not

(1) 3 App. Cas. 165.

mean to say it is not an authority, and that the learned counsel for the Appellants were not perfectly justified in pressing it.

For all that, however, I think, looking at the construction of sect. 72, the fair construction of the words, taking all the circumstances into account, is the other way, and that it means that the mine-owner may, as soon as the thirty days have elapsed, proceed to work, not only (as would have been implied before from the mere fact of the thirty days elapsing) taking due care about the surface, but to work in any manner he pleases. The section proceeds to say that distinctly. But I do not think there is any necessity to imply and interpolate here what is not in terms expressed in sect. 71, that he shall have a right then to work not stoppable by any counter-notice given after the thirty days have expired. The words are: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked" (I will leave out the superfluous words), "it shall be lawful for such owner to work the mines, or such parts thereof for which the company have not agreed to pay compensation, in such manner as he shall think fit." It is not an absurd interpretation to say that that means that he shall have an indefeasible right to work from the moment the thirty days have elapsed; but certainly it does not say so in terms.

The other meaning of the two which may be put upon these words is that which I have indicated, namely, if the thirty days have elapsed without a counter-notice, the mine-owner may begin to work, and then as to such portions as he has worked, the counter-notice, if it ever comes, will come too late; but as to such portions as he has not worked, when the counter-notice comes, if the railway company makes compensation for all the damage that is sustained in consequence of leaving them unworked, there would seem to be no reason in justice why that should not be done. I quite agree that where the words of an Act are clear we ought not to alter them or strain them to do what we think is reasonable; but where the words are not clear we must always look at the reason of the thing, and understand the circumstances, in order to see what those words, applying to such a subject-matter, mean. Now, seeing that there is no injustice in saying, and no reason at all for not saying that the company may stop the

H. L. (Sc.) 1880 DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES. Lord Blackburn.

workings at any time before the mine-owner begins working the unworked parts, paying full compensation for all the damage they may occasion by stopping them, I think, as the words will bear that meaning, it is better so to construe them than to say, "If your company have allowed thirty days to elapse, they shall then be at the mercy of the mine-owner, and be obliged to make such a bargain as they can with him, because if he says, I will take away minerals worth £100, and thereby tumble down your line at the cost of thousands, I demand therefore that you shall pay me a higher price"—that is not exactly what the Legislature would wish to encourage or assist him in doing. As I said before, if the words were clear such a consideration would not entitle us to warp them; but I think the words are by no means clear, and we are entitled to have regard to this consideration in interpreting them.

It was suggested in the course of the argument that there might be cases in which a mine-owner having begun to work, or made preparations for working, would sustain very heavy damage indeed, if the company changed their minds, and tried to stop him afterwards. Such a thing is conceivable and possible; but it is a good, sound maxim in construing Acts of Parliament to say *in ea quæ frequentius accidunt præveniunt jura*—that the Legislature do not foresee and do not provide for very improbable events, although they may be possible ones.

Therefore, my Lords, I have come to the conclusion that the true construction of these sections is that which the Second Division of the Court of Session have put upon them, and not that which the Lord Ordinary put upon them; and being of that opinion, I perfectly concur with the motion which my noble and learned friend on the woolsack has made.

LORD WATSON:—

My Lords, this case raises a very important question in regard to the construction of sects. 71 and 72 of the *Railways Clauses (Scotland) Act* of 1845. I think the general scheme of those two sections, taken in connection with sect. 70, does not admit of doubt. The Legislature did not contemplate that a railway company at the time of constructing their line should be under any

obligation to acquire the minerals. The Legislature, however, intended that the railway company should have an opportunity of acquiring those minerals, if they should come to the opinion that their retention in an unworked state was necessary for the support of the line. Their time for taking them is regulated by these clauses, and the obligation to elect whether they shall take those minerals or not is delayed until the period shall have arrived when in the ordinary course of the underground workings of the owner they are approached so nearly as to be immediately worked if the workings proceed. I do not think it was in the least degree the intention of the Legislature to give to the owners of mines an opportunity, by giving a notice, of compelling the railway company to purchase the minerals, and then leave them unworked. Now, taking the 71st section of the statute by itself, it imposes in the first place, as I read it, a limitation upon the right of the mine-owner to work, that limitation being that he shall not work for thirty days. He is to give a notice at the commencement of the thirty days, and it is perfectly obvious from the tenour of the clause that within that period he is not to be at liberty to work, because the clause prescribes that during that period certain opportunities are to be afforded to the railway company, or to certain men of skill employed by them, to inspect the workings and to inspect the materials which are to remain unworked during that period for that purpose. Then it proceeds to confer upon the railway company a right to take those unworked minerals either in whole or in part, that is to say, they may either elect to take all the minerals that remain unworked within the prescribed distance, or within forty yards, or they may indicate the portion which is to be left unworked, and compel the mine-owner to leave it. Then follows what appears to me a very important part of the clause in considering the present question. There is a provision made for full compensation on the part of the railway company, not only for the value of the minerals which are left unworked, but for all the loss and damage which may accrue from their not being worked.

The real question in the present case arises upon the terms of the earlier portion of the 72nd section of the statute. According to one view (that of the Appellants), it imposes a very serious

H. L. (Sc.) 1880 DIXON v. CALEDONIAN AND GLASGOW AND SOUTH WESTERN RAILWAY COMPANIES. Lord Watson.

limitation upon the right to give a notice to take, which is conferred upon the railway company by sect. 71. The Appellants contend that, although under the provisions of section 71 it would have been within the competency of the railway company to give a notice to take at any time before the minerals or any part of them are worked, the effect of this limitation is to deprive them of all right to give such notice unless it be given, not within thirty days before the minerals are actually worked, but within thirty days counting from the day on which they receive the notice. I entirely dissent from that view, and I concur in the view of your Lordships, which is also that on which the Court below proceeded (the learned Judges of the Second Division), namely, that these words are simply intended to provide that the owner's right to work is no longer to be suspended, and that he may proceed to work without regard to any obligation of support to the railway either subjacent or lateral, and that he may work free of any condition of that kind unless and until his operations are stopped by a notice from the company under sect. 71. I prefer that reading. It appears to me to be the more natural one, without taking into account any of those obvious considerations of convenience and public expediency to which the noble and learned Lord on the woolsack has already alluded. I prefer it, for this reason amongst others, that it leaves untouched the provisions of sect. 71 and is in entire harmony with them.

I think this was a very necessary clause. I do not think it was in the least degree inofficious in the view which I take. The words " if before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked," appear to me to be exceedingly appropriate if you apply them to the suspended right of the mine-owner to work, but I think they are exceedingly inappropriate if they were intended to be applied to the supposed right or the supposed obligation on the part of the company to give notice within thirty days of their receipt of a notice from the mine-owner. My Lords, it is important in construing this clause to keep in view that it was necessary in order to complete the scheme of these sections, and in order to do away with all obligation on the part of the landowner to give support to the railway in the event of the railway company not

electing to take his minerals. And it is very obvious that if you read the clause in the way your Lordships hold that it ought to be read, the result to the mine-owner is this—he can impose a most effective practical limit upon the right of the company, or upon the time which the company may take to purchase his minerals compulsorily; he can work them out, and that will put an end to all right on the part of the company, the subject having disappeared. On the other hand, if your Lordships had adopted the reading of the clause which was suggested on the part of the Appellants, the result would have been that at the end of the thirty days the right of the company to take minerals by purchase would have absolutely gone. And, as far as I can see, the words of the 72nd section do not require actual working—they merely make it lawful—the mine-owner would have the option of working them or not, and for all I see he might have left them unworked for thirty days or for thirty years longer. That appears to me to be entirely contrary to what was contemplated by the Legislature, namely, that the company were not to take or pay for these minerals until they were on the point of being worked, or until in the course of fair working they would have been removed.

My Lords, I do not consider it necessary to advert to any of the other considerations which have been so amply discussed by your Lordships. I will only express my entire concurrence in the judgment now proposed to be pronounced.

Interlocutors under appeal affirmed, and appeal dismissed with costs.

Lords' Journals, 12th July, 1880.

Agent for Appellants: *W. A. Loch.*
Agents for Respondents: *Grahames, Wardlaw, & Currey.*

[PRIVY COUNCIL.]

J. C.*
1880
March 2, 3;
June 23;
July 14.

THE ORIENTAL BANK CORPORATION . APPELLANT;

AND

HENRY B. WRIGHT (ACTING TREASURER OF THE PROVINCE OF GRIQUALAND WEST) . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF THE PROVINCE OF GRIQUALAND WEST.

Construction—Cape Colony Act, No. 6 of 1864—Bank Notes.

The intention to impose a charge upon the subject must be shewn by clear and unambiguous language.

Where by an Act of the *Cape Colony* (No. 6, 1864), "for imposing a duty upon bank notes," which Act was assumed to have been validly extended to the province of *Griqualand West*, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that Act; it was

Held, that the Appellant Bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province, was not liable, according to the true construction of the Act, to make any return to the Respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch.

Although by sect. 10 of the Act banks of issue liable to make the return prescribed by the Act, must include within such return such notes also as they have put into circulation, yet banks which, not issuing any notes purporting to be locally issued, and therefore not liable to make a return, put into circulation within the province their own notes, issued elsewhere, are not in respect thereof liable to the duty imposed by the Act.

APPEAL from an order of the High Court (March 15, 1877), by which the Appellant Bank was required to render to the Respondent a return of the notes paid out or put into use and circulation by the *Kimberley* agency of the Appellant Bank during each month since the 1st of November, 1875, up to the date of the application.

By proclamation, dated the 27th of October, 1871 (No. 67),

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

made by Sir *Henry Barkly*, Her Majesty's High Commissioner in *South Africa*, *Griqualand West* was declared to be British territory, and by another proclamation of the same date (No. 68), it was provided, that in the absence of any proclamation to the contrary, the laws and usages of the colony of the *Cape of Good Hope* should be deemed to be the laws of the territory of *Griqualand West*, so far as the same should not be inapplicable thereto. These proclamations so far as material are set out in the judgment printed below.

By the statute of the colony of the *Cape of Good Hope*, No. 6, 1864, intituled the *Bank Notes Duty Act*, 1864, the material sections of which are also set out in the judgment, it was enacted that every joint stock bank trading as bankers in the colony of the *Cape of Good Hope*, and issuing bank notes, should be bound and obliged to transmit to the Treasurer General of the colony of the *Cape of Good Hope* certain monthly returns therein specified, and by the same Act certain duties therein specified were imposed upon bank notes.

In or about the year 1872, the Appellant Bank, which had then a colonial branch at *Port Elizabeth*, in the colony of the *Cape of Good Hope*, established an agency at *Kimberley*, in the province of *Griqualand West*.

On the 27th of June, 1876, the Respondent, in his official capacity, gave notice to the Appellant's *Kimberley* agency that the High Court would be moved for an order in the terms of the *Bank Notes Duty Act*, 1864, commanding the Appellant, as the *Oriental Bank Corporation* of *Kimberley*, to make a return to the Respondent of all bank notes paid or put into use or circulation by the bank during the months of March to December, 1873; and the several months of the years 1874 and 1875, and the months of January, February, March, and April, 1876,

The application of the Respondent was supported by an affidavit made by him, stating that, by virtue of the Act the Appellant was bound to transmit to the Respondent monthly returns of the amounts of bank notes paid out, or put into use or circulation, by the bank at *Kimberley*, and that the bank had failed and refused to send in such returns for the periods aforesaid.

The Appellant filed affidavits and documents in reply, which

J. C. 1880 ORIENTAL BANK CORPORATION v. WRIGHT.

it relied upon as shewing that the Government of the province had for a long time treated such notes as were sought to be included in the returns claimed as not liable to duty in the province, and it was contended that such notes would not have been circulated but for the conduct of the Government, and that such returns as were claimed would now be impossible.

On the 15th of March, 1877, the motion against the Appellant Bank, with similar motions against the *Cape of Good Hope Bank* and the *Standard Bank of British South Africa* (*Limited*), came on for hearing at *Kimberley*, in the province, before His Honour the Recorder of *Griqualand West*, who ordered a return to be made to the Respondent by the Appellant at *Kimberley* :—

1. Of its own notes outstanding on the last day of November, 1875, and on the last day of every succeeding month up to the date of application.

2. Of all the notes of the *Kimberley* agency of the *Oriental Bank Corporation* or any other bank, which notes should on the face of them appear to have been issued at or from any place in *Africa*, or elsewhere, not within the limits of the said province, and which notes having come at any time, and in any measure, to the hands of such bank since the first day of November, 1875, should, during the month for which any such return should be made have been by the bank paid out or put into use or circulation in the said province.

Mr. *Benjamin*, Q.C., and Mr. *J. C. Mathew*, for the Appellant Bank, contended that the order of the Court below was erroneous. First, the *Bank Notes Duty Act* of 1864 never became part of the laws of *Griqualand West* or applicable thereto. As regards the 2nd section of the Proclamation of the 27th of October, 1871, that and the preceding proclamations were issued for a temporary object appearing on the face of the first proclamation, and consequently could not be construed as extending to the province any such Act as the one in question, or, indeed, any Acts imposing duties other than those specifically mentioned in the proclamation. Further, the intention of those proclamations could only be that such Acts of the colony as were in their nature applicable to the circumstances of the province should be applied. It was contended that the

circumstances of *Griqualand* were quite different from those of the *Cape Colony*, and therefore that the revenue laws of the one could not be applied to the other. Revenue and police regulations do not apply unless specially applied.

Second, assuming the Act to be applicable, the Appellant's agency bank at *Kimberley* was not a bank of issue within the meaning of the Act. That agency had never before the commencement of these proceedings issued, paid out, or put into circulation, its own local notes or any notes purporting on the face of them to be issued in the Province of *Griqualand West*. It had always used the notes of the Appellant bank, dated and payable in *Port Elizabeth*. Such notes had in every case been put into circulation, and had paid bank note duty in the colony of the *Cape of Good Hope* previously to having been used at the *Kimberley* agency.

The Act was not intended to apply in the province to notes which had been issued, or paid out, or put in circulation, and on which duty had been paid in the *Cape Colony* before being used in the province. Sect. 9, sub-s. 4, shews that returns are only to be made by the head office.

The Solicitor-General (Sir *F. Herschell*, Q.C.), and Mr. *Finlay*, for the Respondent, contended that the order appealed from was right. The Act was not inapplicable to *Griqualand West*, and therefore came into force in that province by virtue of the proclamation of the 27th of October, 1871. It was analogous to other laws and statutes referred to in the judgment of the Court below as admittedly in force in the province. An Act for the protection of the revenue cannot in its nature be considered inapplicable to the circumstances of the province. Banking business has been carried on in the province since its incorporation in the British dominions; bank notes have been there circulated by the Appellant Bank and other banks; and therefore a law providing for payment of a duty by bankers is not inapplicable. The Act should be read as if the words "the province of *Griqualand West*" had been substituted for the words "this colony."

Second, the Appellant Bank has, in respect of its circulation of bank notes in the province, rendered itself liable to make the

J. C.
1880
ORIENTAL BANK CORPORATION v. WRIGHT.

return and pay the duty as directed. It was contended that bank notes forwarded by the Appellant Bank to its branch in the province, and there put in circulation by the branch, although dated and payable in *Port Elizabeth*, were really issued in the province within the meaning of the Act. Otherwise, if the notes must be deemed to have been issued in *Port Elizabeth*, the bank put them in circulation in the province and ought to make a return thereof.

Further, it was contended that the bank fell within the terms of both the 1st and the 10th sections of the Act; and that being exempted in respect of its notes from the stamp duty imposed upon bills and promissory notes by Act No. 3 of 1864 (applicable to and therefore in force in the province), it was reasonable that it should pay in substitution the duty provided by Act No. 6 of 1864.

Mr. *Benjamin*, Q.C., replied.

Their Lordships subsequently directed the case to be re-argued; and the case came on for hearing on the 23rd of June.*

Mr. *J. C. Mathew*, for the Appellant.

The Solicitor General (Sir *F. Herschell*, Q.C.), and Mr. *Finlay*, for the Respondent.

1880
July 14.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal by the *Oriental Bank Corporation* against an order of the High Court of the province of *Griqualand West*, made upon the application of the Respondent, the acting treasurer of the province, whereby the bank was directed to make a return (1) of its own notes outstanding on the 1st of November, 1875, and (2) of all bank notes of the *Kimberley* agency of the *Oriental Bank*, or any other bank, which on the face of them bear to have been issued at or from any place in *Africa*, or elsewhere not

* *Present*:—LORD BLACKBURN, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

within the province, and which, since the 1st of November, 1875, have been paid out or put into use and circulation in the province by the bank. The order for this return was based on an Act of Parliament of the *Cape Colony*, No. 6, 1864, "For imposing a duty upon bank notes," with a view to the imposition of the duty chargeable by that Act.

This case has been twice argued at their Lordships' bar.

Two objections, and two only, were urged on behalf of the Appellant, either of which would, if established, be sufficient to shew that the order appealed against was wrong. Their Lordships are of opinion that the second of these objections is well founded; and they do not express any opinion upon any other matter. Although on the first objection they give no decision, it must not be inferred that they have formed an opinion upon it adverse to the Appellant.

In order, however, to make intelligible the point on which their Lordships express an opinion, a short statement is necessary.

On the 27th of October, 1871, several proclamations were issued by Sir *Henry Barkly*, then High Commissioner. The most material of these are Nos. 67 and 68, which must be construed together, from which the following are extracts:—

"No 67, 1871. October 27th, 1871.

"Proclamation declaring *Waterboer* and tribe of *Griquas* British subjects, and their territory British territory. Boundaries set forth.

"Whereas Captain *Nicholas Waterboer*, paramount chief of the *Griqua* people and territory of *Griqualand West*, with his raad or council, has on behalf of himself and his said people petitioned Her Britannic Majesty Queen *Victoria* that she would be graciously pleased to accept into her allegiance him, the said *Nicholas Waterboer*, and his said people, and to declare him and his people to be British subjects, and their territory to be British territory.

"And whereas Her said Majesty, on receiving the said petition, was graciously pleased to signify her assent to the prayer thereof, and to authorize me in her name, as her high commissioner, to grant the said prayer, and to accept the said allegiance, and to declare the said chief, *Nicholas Waterboer*, and his said people to be British subjects, and the territory of the said chief and people

J. C. 1880 ORIENTAL BANK CORPORATION v. WRIGHT.

to be British territory, conditionally on the Parliament of the colony of the *Cape of Good Hope* consenting that the said territory shall become part of the colony aforesaid, and undertaking to provide for the government and defence thereof and of the said people.

"3. And whereas the two Houses of Parliament of the said colony of the *Cape of Good Hope*, by addresses, dated respectively the 5th day of August, 1871, and the 8th day of August, 1871, presented to me, have communicated to me that they have resolved that, pending the adjustment of certain disputes therein referred to regarding the boundaries of the said territory, and the passing of a law for the annexation of the said territory, therein called the *Diamond Fields*, to this colony, the said Houses were of opinion, respectively, that I should be requested to adopt such measures as might appear to me to be necessary and practicable for the maintenance of order among certain inhabitants of the said territory engaged in searching for diamonds therein, and in the said resolution termed the diggers, and the other inhabitants of the said territory, as well as for the collection of revenue and the administration of justice.

"4. And whereas it is necessary, for the purpose of so maintaining order, collecting revenue, and administering justice in the said territory, that I should in Her Majesty's name, grant the prayer of the said chief, *Nicholas Waterboer*, and his said people, and assume sovereign jurisdiction in and over the said territory.

"5. Now, therefore, I do hereby proclaim and declare that from and after the publication hereof the said *Nicholas Waterboer*, and the said tribe of the *Griquas* of *Griqualand West*, shall be, and shall be taken to be, for all intents and purposes British subjects, and the territory of or belonging to the said *Nicholas Waterboer* and the said tribe shall be taken to be British territory, and I hereby require all Her Majesty's subjects in *South Africa* to take notice of this my proclamation, accordingly."

"No. 68, 1871.

"October 27th, 1871.

"Proclamation declaring laws and usages of *Cape Colony* as laws for *Griqualand West*, so far as the same shall not be inappli-

cable. Quarterly Wine and Spirit Licensing Board vested with the powers of the March Licensing Board in *Cape Colony*. Stamps. Licence duties and fees of office payable as in *Cape Colony*. *Cape* stamps valid. Recorder's powers as to Resident Magistrates' Courts.

"Whereas I have, by proclamation of this day's date, No. 67, declared the sovereignty of Her Majesty Queen *Victoria* over the territory of *Griqualand West*, as defined by my said proclamation, and it is expedient to make provision for the good government of this said territory pending the passing of a law to annex the same to the colony of the *Cape of Good Hope*.

"2. Now, therefore, I do hereby proclaim, declare, and make known that, except in so far as I have already proclaimed, or may hereby or hereafter proclaim to the contrary, the laws and usages of the said colony of the *Cape of Good Hope* shall be deemed to be the laws of the said territory, so far as the same shall not be inapplicable thereto.

"3. The laws relating to the sale of wines, malt liquors, and spirituous liquors within the said territory shall be the same as the laws of the said colony relating to the same matters, save that the several quarterly licensing boards in the said territory shall at each meeting thereof have the like powers as the licensing boards in the said colony now possess at the February meeting of such boards only.

"4. All stamp and licence duties, and all fees of office now payable in the said colony shall be payable likewise in the said territory as if the same were part of the said colony, and the stamps and fees payable in the Supreme Court and the Court for the Eastern Districts of the *Cape of Good Hope* shall be payable as near as may be in the High Court of *Griqualand* in like manner as in the said Supreme Court and Court for the Eastern Districts of the *Cape of Good Hope*, and all stamps of the said colony shall be deemed likewise to be stamps for the said territory, and shall be valid therein and used as if the said territory were part of the said colony."

The condition attached to the previous authority given by Her Majesty to the High Commissioner, viz., "the parliament of the

J. C. 1880 ORIENTAL BANK CORPORATION v. WRIGHT.

colony of the *Cape of Good Hope* consenting that the said territory should become part of the colony aforesaid, and undertaking to provide for the government and defence thereof and of the said people," has not been fulfilled to this day. But Her Majesty having been pleased subsequently to ratify the proclamations, they have the same validity as if they had been previously authorized. The argument of the Appellant was that the temporary object which was contemplated when the proclamations were issued was very important to be considered in construing the 2nd clause of the Proclamation No. 68. And his first objection to the order appealed against was, that the proclamation made for such a temporary object could not be construed as intended to apply to the territory any such Act as the Act for imposing a duty on bank notes, or, indeed, any Acts imposing duties other than those specially mentioned.

Their Lordships, as already stated, do not think it necessary to determine what the true construction of the proclamation is, for they are of opinion that the second objection made to the order must prevail. That objection was that, assuming the Act for imposing a duty upon bank notes to have been validly extended to the province, and to be construed as if the words province of *Griqualand West* were to be read in it instead of colony of the *Cape of Good Hope*, that Act originally applied only to banks of issue within the colony, that is, banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony; and that the *Oriental Bank*, though having a branch at *Kimberley*, within the province, and there putting in circulation notes issued by it in the colony and payable there, did not issue any notes payable in the province, and so was not liable to make any return.

What the *Kimberley* branch bank in fact did, is thus stated in the affidavit of Mr. *Ross*, the manager of it:—

"I. That this agency of the said corporation has never issued its own local notes, or any notes purporting on the face of them to be issued in this province, but has always used the notes of the *Oriental Bank* dated and payable in *Port Elizabeth*, and which notes have in every case been put into circulation, and have paid

bank note duty in the *Cape Colony* previous to having been used at my agency."

Port Elizabeth is in the *Cape Colony*, not in the province.

The material parts of the *Colonial Act* are as follows:—

"Whereas the privilege enjoyed by the joint stock banks of this colony of issuing bank notes is one in regard to which a duty, regulated by the average amount of such notes kept in circulation by each bank, may justly be imposed: Be it enacted by the Governor of the *Cape of Good Hope*, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:—

"1. Every joint stock bank trading as bankers in this colony, and issuing bank notes, shall be bound and obliged to transmit to the Treasurer General of this colony monthly returns of the amount of bank notes in circulation by such banks: Provided that for the purpose of this Act the term 'bank notes' shall not include bank post bills.

"2. The first return to be made by every such bank under this Act shall state the amount of the bank notes of such bank outstanding on the last day of September, 1864, and every succeeding return shall state the amount of such notes outstanding on the last day of each succeeding month."

It then prescribes the form of the return.

4. Imposes a duty "of one pound and ten shillings per centum upon the average issues of each year, ending the 31st of December, such average issues to be ascertained by adding together the amounts set forth in the several monthly returns of such bank for such year, and by then dividing the result by twelve."

Section 5 provides the mode in which an order may be obtained for enforcing the return. It is under this section that the order now appealed against is framed.

"6. If any person or copartnership, not being a joint stock bank, shall issue notes payable to bearer, or at sight, or on demand, in which notes the amount for which such notes are made shall not be written, but engraved, printed, or lithographed, such person or copartnership shall come under the provisions of this Act in like

J. C. 1880

ORIENTAL BANK CORPORATION v. WRIGHT.

manner as if such person or copartnership were a joint stock bank."

7 and 8 are not material.

"9. As often as any joint stock company carrying on business as bankers in this colony, whether their chief seat of business shall be in this colony or elsewhere, shall have in this colony a head office, and one or more branch banks also in this colony, the monthly returns mentioned in the first section of this Act shall be made as follows, that is to say:

"1. If the branch bank shall issue its own notes, namely, notes purporting to be issued by or at the place of business of such branch bank, then the returns aforesaid shall be made by such branch bank direct, precisely as if such bank were an independent and unconnected bank and not a branch.

"2. No such last-mentioned branch bank shall, in calculating its bank notes outstanding, be at liberty to deduct from its circulation any bank notes of its head office, or of any other branch of the same bank, which notes such branch bank may happen to have on hand.

"3. In like manner, no head office of any bank having one or more branches, shall, in calculating its bank notes outstanding, be at liberty to deduct from its circulation any notes of any of its branches, which notes such head office may happen to have on hand.

"4. Should there be at any time in this colony a bank having a head office and one or more branch banks, which branch bank or banks shall not issue any such notes as are in the first subdivision of this section described, then the returns aforesaid shall not be made by or from the branch bank or banks or by or from the head office, and shall include the whole outstanding circulation of the said bank, including all its branches.

"10. Every joint stock bank carrying on business as bankers in this colony shall, in making its monthly returns for the purpose of this Act, include therein all bank notes of the same or any other bank, which notes shall, on the face of them, bear to have been issued at or from any place in *Africa*, or elsewhere not within the

limits of this colony, and which notes having come at any time and in any manner into the hands of such joint stock bank, shall, during the month for which any such return shall be made, have been by such joint stock bank paid out or put into use or circulation: Provided, however, that from and out of such bank notes as aforesaid so to be included as aforesaid may be excepted notes of the Governor and Company of the *Bank of England*: Provided also, that the transmission of any such bank notes as are first aforesaid by any joint stock bank to the place where such notes were issued, or to any other place beyond the limits of this colony, in a closed cover or parcel, shall not be deemed to be a paying out of such notes or a putting of the same into circulation, so as to require that the bank notes so transmitted shall be included in any such return as aforesaid. And provided lastly, that the duty imposed by the 4th section of this Act shall be payable upon the amount of all such bank notes as shall, under and by virtue of this section, be included in any monthly return, precisely as if such bank notes so included had been notes of the bank making such return, and issued by it at the place of business of such bank by or from which such return shall be made."

There is much weight to the argument, based on the words of the 2nd section, which require the return to be of "the bank notes of such bank outstanding" on the last day of the month, that the notes must be notes of that bank issued within the colony still outstanding; and consequently that the Act can only be meant to apply to those banks which act as banks of issue within the colony, to banks which have such notes.

This argument is strengthened by the terms in which the 6th section is framed: the person who issues (that is within the colony) notes payable on demand, must mean the person issuing his own notes. If it were not for the 10th section, on which it will be necessary to comment hereafter, it could not be supposed that a private banker who issued no notes of his own, became liable to the tax, because he paid away, and so put in circulation, notes of other banks, instead of sending them in for collection. And the language of sect. 9 (which is only material in as far as it throws light on the other sections) points strongly in the same way from the terms in which "its own notes" are defined, as

J. C. 1880 ORIENTAL BANK CORPORATION v. WRIGHT.

being those purporting to be issued at, and consequently payable at, the place of business of that branch bank, and also from the 2nd and 3rd sub-sections which mark the distinction between its notes on hand in other branches of the same bank, which are not to be deducted, and notes payable at the branch which, when once paid by it, are no longer in circulation until re-issued.

For these reasons, if the Colonial Act had stopped at the end of the 9th section, their Lordships would have had very little doubt that it only applied to banks of issue issuing within the colony notes payable by themselves there.

But a more difficult question arises whether the bank is not liable to make returns under the 10th section.

The *Kimberley* branch of the *Oriental Bank* has indisputably put into use and circulation bank notes of the *Oriental Bank* which on the face of them bear to have been issued at *Port Elizabeth*, a place out of the province. And if it is liable to make a return it must include these notes in that return. But the 10th section does not, in terms at least, impose any fresh obligation to make returns.

It has been contended that the bank is not within this enactment, and that the description "every joint stock bank carrying on business as bankers in this colony shall in making its monthly returns" at the commencement of clause 10, ought, having regard to the context and the rest of the Act, to be construed as referring only to banks pointed at in the earlier sections which were by those sections required to make returns. It was contended that no bank, unless it also issued such notes, was liable to pay duty on the notes of its own or of any other bank that it might put into circulation. The primary object of the *Bank Note Duty Act* certainly seems to have been to subject banks issuing their own local notes (in the sense above mentioned) to duty on the notes they so issued; but it being doubtless foreseen that some banks, besides issuing such notes, might put into circulation notes of their own or of some other bank, which, though not purporting to be issued in the colony, would still become part of its paper currency, the framers of the Act seem to have thought that banks of issue which thus increased the paper currency got an advantage thereby, and should be taxed, and introduced the 10th clause to meet such

cases, and to bring within the scope of the Act all notes except *Bank of England* notes, thus put into circulation by banks so carrying on business in the colony. The question is whether, though the description at the commencement of the 10th clause is "every joint stock bank carrying on business as bankers in this colony" without the words "and issuing bank notes" found in section 1, that description is not by implication confined to the banks pointed at in section 1.

The Legislature certainly seems, in the earlier provisions of the Act, to have had in its view banks of issue issuing local notes in the sense above mentioned, and to have contemplated the putting forth of the notes described in sect. 10 as an addition or supplement to such issue. The form of return given in the Act plainly indicates that this was the state of things in the contemplation of the Legislature; for the form assumes that there would first be a return by a bank of its own local issue, and then provides by way of addition thereto for a return of the notes described in sect. 10, if any such notes should have been issued. It is true that this form is to be followed in substance only; but sect. 10 itself implies an antecedent liability upon a bank to make a return of its local notes, to which the return under that section would be supplemental and additional. The words of the 10th section are: "Every joint stock bank carrying on business as bankers in this colony shall, in making its monthly returns for the purpose of this Act, include therein" the bank notes described in that section. From this language, as well as from the form of return given by the Act, it may be inferred that the Legislature did not contemplate the case of a bank putting out such last-mentioned notes only, and so did not provide for a separate and independent return of such notes. Although, therefore, the 10th section enacts that the duty imposed by the 4th section shall be payable upon such notes when included in any return, "precisely as if such bank notes so included had been notes of the bank making such return, and issued by it at the place of business of such bank by or from which such return shall be made," yet it is only where the obligation to make returns exists that the duty is imposed, and, as already stated, this obligation does not seem to have been contemplated, nor created, except in the case of banks issuing their own local

J. C. 1880 — ORIENTAL BANK, CORPORATION v. WRIGHT.

notes. The position of a bank putting forth only such notes as are described in sect. 10, without any of its own local notes, would thus seem to be unprovided for by this Act.

Their Lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shewn by clear and unambiguous language, are unable to say that the obligation of the bank to make the return applied for, and its consequent liability to pay duty on the notes put into circulation by its *Kimberley* Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule. This view of the Act appears to have been for a long time entertained and acted upon by the officers of the Government of the Province, for having made a claim for duty they expressly withdrew it, renewing it only after an interval of two years.

This limited operation of the Act undoubtedly entails the consequence pointed out by the learned Judge below, namely, that duty will be payable upon all notes described in sect. 10, when put forth by banks which issue any notes purporting to be locally issued, however few; whilst it will not be payable at all by banks which, not issuing notes purporting to be locally issued, put into circulation within the province their own notes, issued in *London* or elsewhere, however large the amount so put into circulation may be. But if the Legislature, from want of foresight or for any other reason, has omitted to provide for such a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission.

In the result, their Lordships will humbly advise Her Majesty to discharge the order of the High Court, and in lieu thereof to direct that the application of the Respondent be dismissed. The Appellant will have the costs of the appeal to Her Majesty.

Solicitors for Appellant: *Murray, Hutchins, & Stirling.*
Solicitors for Respondent: *Bircham & Co.*

[HOUSE OF LORDS.]

THE PHARMACEUTICAL SOCIETY . . . APPELLANTS;

AND

THE LONDON AND PROVINCIAL SUPPLY ASSOCIATION, LIMITED . . . RESPONDENTS.

H. L. (E.)
1880
July 20, 21, 22.

"*Person*"—"*Corporation*"—*Statute*—31 & 32 *Vict. c.* 121.

Whether the word "person" in a statute can be treated as including a corporation must depend on a consideration of the object of the statute, and of the enactments passed with a view to carry that object into effect.

The 31 & 32 Vict. c. 121, was passed to protect the public against the sale by incompetent persons of poisonous drugs, and in the 1st section enacts that "it shall be unlawful for any person to sell, or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of chemist and druggist, &c., or pharmacist, &c., unless such person shall be a pharmaceutical chemist, &c., within the meaning of this Act, and be registered under this Act." By sect. 15, any person who shall offend in this respect (the words of sect. 1 being almost repeated) shall be liable to pay a penalty of £5, to be sued for as therein directed.

A small body of persons had obtained a registration under the *Companies Acts*, 1862–1867. One only of these persons was a qualified, certified, and registered chemist. His share in the company was very small: he was the person who appeared in the shop and conducted the sales, and he received a salary for his labour in dispensing the drugs, which were sold for the profit of the company:—

Held, that, under these circumstances, the word "person" in the 1st and 15th sections of the statute did not apply so as to make this incorporated company liable to the penalty. But the actual seller must be a qualified person.

APPEAL against a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench Division (1).

"The *Pharmaceutical Society*" was constituted of chemists and druggists, who had formed themselves into a society before 1843, and in that year received a charter of incorporation. The 15 & 16 Vict. c. 56, recited the formation of the society and its charter of incorporation, which was thereby confirmed, and, declaring that it was expedient that persons exercising the business of pharmaceutical chemists should possess competent knowledge thereof,

(1) 4 Q. B. D. 313; 5 Q. B. D. 310.

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

conferred on the society the power to examine persons, and to grant them certificates, and to register them, and prohibited such as had not certificates and were not registered, from assuming the name of pharmaceutical chemist or druggist.

"The *London and Provincial Supply Association*" consisted of some persons who had been registered under the *Companies Acts*, 1862, 1863, and carried on the general business of supply stores. The chief proprietor, one *William Mackness*, was the holder of 564 shares, the holdings of shares by some other persons being only of a nominal amount. Among these small shareholders was Mr. *Henry Edward Longmore*. He was himself a duly registered pharmaceutical chemist, but he appeared also to be a salaried servant of the association, and his especial business was that of superintending the sale of chemicals, which were among the articles sold at the stores.

Certain articles, consisting of poisons, had been bought at the stores, and in respect of the sale of them an action was brought against the association for having infringed the provisions of the 31 & 32 Vict. c. 121 (1). The action was brought in the *Bloomsbury* County Court, where the question discussed was whether the association, being a corporation, could be made liable under the prohibitory clause of the statute, in which the word "person" alone was used. Mr. *George Lake Russell*, the learned Judge of the County Court, had decided that the corporation, as such, was not liable, and that the sale having been, in fact, conducted by Mr.

(1) 31 & 32 Vict. c. 121, s. 1: "It shall be unlawful for any *person* to sell, or keep open shop for retailing or dispensing or compounding poisons, or to assume or use the title chemist and druggist, or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of *Great Britain*, unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, or be registered under this Act," &c.

Sect. 15: "Any person who shall sell, or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist, or who shall take, use, or exhibit the name or title pharmaceutical chemist, pharmaceutist, or pharmacist, not being a pharmaceutical chemist, &c., shall for every such offence be liable to pay a penalty or sum of £5." And the mode of suing for it was provided.

Sect. 17: "For the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant, shall be deemed to be the seller."

Longmore, who was a duly registered pharmaceutical chemist, the action was not maintainable. On appeal the Queen's Bench Division overruled this decision and ordered judgment to be entered for the Plaintiffs. The Appeal Court had reversed the decision of the Queen's Bench Division. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Lumley Smith*, Q.C., for the Appellants:—

The fact that the poisons were actually sold by a duly qualified person did not affect the case. The offence was that of keeping an open shop for the sale of poisons, and that offence, being the one described in the very words of the statute, had been committed by this corporation. The Legislature had desired to secure the best possible protection for the public, and had therefore used expressions which prevented the exposure for sale of these medical poisons, except by properly qualified persons. The corporation kept the open shop and sold the poisons, and received the profits of the sale, and the corporation was therefore liable to the penalty for that breach of the law, for it was not pretended that a share of the profits was really taken by Mr. *Longmore*, who was in truth only a salaried assistant at the stores.

That a corporation could be liable in such a case as this was shewn by many authorities. It did not matter that the word "corporation" was not used in the statute, the word "person" was sufficient. It was a settled rule of law that the word "person" would include a corporation: *Coke's* Institutes (1), and that rule had been applied in many cases. It had, indeed, been questioned in argument by Mr. *Kindersley* in *The Corporation of Newcastle* v. *The Attorney-General* (2). But that doubt was effectually disposed of both by Lord Chancellor *Lyndhurst* and Lord *Cottenham* in the same case (3). In many cases since then, the word "person" had been treated as including a corporation: *The Mayor of Hereford* v. *Morton* (4). The *Apothecaries Act* (55 Geo. 3, c. 194), assumed (s. 30) that actions and suits under that Act might be brought against "bodies politic, corporate, or collegiate," and it required such suits or actions to be brought within six calendar

(1) 2 Inst. 722.
(2) 12 Cl. & F. 402, at p. 411.
(3) 12 Cl. & F. at 419.
(4) 15 L. T. (N.S.) 187.

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

months. The principle had been applied in cases of civil contracts as well as those of a different sort. Thus in *Altman* v. *The Royal Aquarian Society* (1) a society was held liable to an injunction for its manager permitting a breach of an agreement. In *The Queen* v. *The Great North of England Railway Company* (2) it was expressly decided that a corporation aggregate may be indicted for a misfeasance. The Legislature itself had recognised that principle of construction, for in the 7 & 8 Geo. 4, c. 28, the 14th sect. enacted that "wherever this or any other statute relating to any offence, whether punishable by indictment or upon summary conviction," in describing the offence shall use the singular number, the words used should be understood to include "bodies corporate as well as individuals." There the words "unless there is something repugnant to such a construction," were added. Those words, which seemed to establish an exception, really made the case here the stronger, for throughout this Act there was nothing repugnant to the construction now contended for, while the 17th section used words so general as to shew that "person" must include both natural persons and persons in law. Private partnerships would undoubtedly be within the mischief of the statute, and this association was really a private partnership, consisting only of a very small number of persons, although, from being registered under the *Companies Acts* of 1862 and 1867, it assumed the technical form of a corporation. In *Boyd* v. *The Croydon Railway Company* (3) there was a provision that no action was to be brought against any person for anything done in pursuance of the *Croydon Railway Act* without a certain notice being given, and it was held that the word "person" included the company, which was therefore entitled to the required notice. So in *Cortis* v. *The Kent Waterworks Company* (4), where rates were authorized to be made on all and every persons or person who owned or occupied land in the parish, a corporation was held liable to be rated, and, under a section which required a personal demand of the rate, a demand made at a meeting of the corporate body was held sufficient.

The object of this Act, which was to secure the public against incompetent persons selling poisonous drugs, would be defeated if

(1) 3 Ch. D. 228.
(2) 2 Q. B. 315.
(3) 4 Bing. N. C. 669.
(4) 7 B. & C. 314.

corporations, as such, which must be incompetent to perform such matters, were held not to be within the meaning of the statute.

Mr. *Wills*, Q.C., and Mr. *Finlay*, for the Respondents :—

The whole framework of this Act and all its provisions shew that "person" here meant individual, and could not be applied to a corporation. There was no doubt that there were instances in which the word "person" used in a statute would mean corporation, but there the nature of the matter dealt with by the statute, and its obvious purpose, would shew that that was the intention of the Legislature. Here both reasons were opposed to such a construction. The work to be done could not be done by a corporation—the examinations to qualify for the work could not be gone through by a corporation, and the certificate of fitness and the registration could not be granted to, or made for, a corporation. Every provision in the statute, as had been pointed out in the Court below, applied to individuals. Selling the drugs, and not keeping a shop for their sale, constituted the offence, and here the individual who sold the drugs was a qualified person. *Harrison's Case* (1) and *Raynard* v. *Chace* (2), were referred to and commented on.

Mr. *Benjamin* replied.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, I cannot say that this case appears to me to be free from difficulty, especially as we have two Courts of high authority differing from each other, the Lord Chief Justice and Mr. Justice *Mellor* having taken the view of the statute for which the Appellants contend, and the Court of Appeal having taken the opposite view.

The question really comes to be one upon the construction of the particular words of the 1st and 15th sections of the statute, having regard to the general principles on which an ambiguous word, such as "person," ought to be construed. There can be no question that the word "person" may, and I should be disposed myself to say *primâ facie* does, in a public statute, include a person in law : that is, a corporation, as well as a natural person.

(1) Leach C. C. 166.

(2) 1 Burr. 2.

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Selborne, L.C.

But although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far. Statutes, like other documents, are constantly conceived according to the popular use of language; and it is certain, that this word is often used in statutes in a sense in which it cannot be intended to extend to a corporation. That accounts for the frequent occurrence in some statutes, in interpretation clauses, of an express declaration that it shall extend to a body politic or corporate; and in others, of which an example was cited during this argument by Mr. *Benjamin*, I mean the Act as to apothecaries, there will be found clauses which say that the remedies of persons who may complain of acts done under colour of the authority of the particular Act, or in pursuance of it, must be prosecuted within certain limits of time, against all "persons and bodies politic and corporate;" language which appears to treat the word "persons" as not in itself including corporations.

I think the principle laid down by the junior counsel for the Respondents was substantially right; that if a statute provides that no person shall do a particular act except on a particular condition, it is, *primâ facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever.

If that be a sound observation, it goes far to decide this case when we look to the language of the 1st and 15th sections. The 1st section (merely transposing the place in which certain words are used) is this:—"From and after the 31st day of December, 1868, it shall be unlawful for any person (unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act) to do certain things." *Primâ facie*, that contemplates individual persons,

such as may or may not be pharmaceutical chemists or chemists and druggists within the meaning of the Act, and be registered under the Act. What kind of persons can be such pharmaceutical chemists or chemists and druggists, and be so registered? Can a corporation, or can it not?

I think it is clear from the sequel of the Act that a corporation cannot. A corporation certainly cannot, under the provisions of the *Pharmacy Act,* be a pharmaceutical chemist. Nor can it be a chemist and druggist "within the meaning of this Act," and be registered under this Act. The 3rd clause says that "chemists and druggists within the meaning of this Act shall consist" (amongst others) "of all persons who at any time before the passing of this Act have carried on in *Great Britain* the business of a chemist and druggist, in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners." That indeed might have applied to a corporation, if a corporation could be registered. But, with regard to that class of persons, who had previously carried on such a business, the 5th section requires them to be registered; and, in order to be registered, requires a claim to be made by notice in writing signed by the person, which notice is to be in the form set forth in the schedule. I do not see myself how it is possible to suppose that the Legislature contemplated that any one but a person who could sign the claim in the manner prescribed, was to be registered under those clauses. And, in addition, I find this in the 18th section: "Every person who at the time of the passing of this Act is or has been in business on his own account as a chemist and druggist as aforesaid, and who shall be registered as a chemist and druggist, shall be eligible to be elected, and continue a member of the *Pharmaceutical Society* according to the by-laws thereof." That appears to me plainly to shew that the Legislature required and provided for the registration of persons who before the Act carried on the business of chemists and druggists, in a sense applicable only to those who could become members of the *Pharmaceutical Society;* in other words, only to individual persons. With regard to those who might afterwards carry on the business of chemists and druggists, the Act requires them to undergo certain examinations, which are necessarily

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Selborne, L.C.

inapplicable to a corporation. The conclusion, therefore, which I come to is, that these words "unless," and so on, are inapplicable to corporations. This being not a general prohibition of the trade or business, but merely an enactment that it shall be unlawful for any person, unless he complies with certain conditions, to carry on these otherwise lawful trades or businesses (not only keeping a shop for retailing poisons or selling poisons, but also "to assume the title of chemist and druggist, or chemist or druggist"),—I cannot but think it the sounder construction of the word "person" to hold, that only such persons are contemplated as might, by the use of the proper means, comply with the condition, and so be enabled to carry on the trade.

Exactly the same observations occur upon the 15th section. There, again, transposing only some words, we find this description of the class of offenders on whom the penalties in question are imposed. "From and after the 31st day of December, 1868, any person (not being a duly registered pharmaceutical chemist, or chemist and druggist) who shall sell or keep an open shop for the retailing &c. poisons, or who shall take &c. the name or title of chemist and druggist, or chemist or druggist;" or (again) "who (not being a pharmaceutical chemist) shall take, use, or exhibit the name or title pharmaceutical chemist, pharmaceutist, or pharmacist," shall be subject to certain penalties. The words follow shortly afterwards; "or who shall compound," &c.; having reference to the particular act of compounding on each occasion on which medicines may be made up; fortifying what I may describe as the individual, I was going to say "personal" construction. The very suggestion of that word exemplifies the difficulty of applying the word "person," in a colloquial and popular sense, to any but individuals.

My Lords, if you look through the Act it will be found, that there is only one place where it seems to be necessary to put upon the word "person" a wider sense; and that occurs in a clause which is in several respects contrasted with the rest of the provisions of the Act, I mean the 17th section. It begins with a general prohibition in unequivocal terms; not "it shall be unlawful for any person," &c., or "for any person not coming within a certain definition;" but "it shall be unlawful to sell,"—unlawful

generally, absolutely, and unequivocally,—"to sell any poison either by wholesale or by retail," as to which certain precautions are not observed. That form of prohibition is repeated twice. First, as to all poisons whatsoever, and then, four lines afterwards, as to certain particular kinds of poison,—"it shall be unlawful to sell" to any person unknown to the seller, &c. That is a universal prohibition, not qualified by any exception as to any description of person; though, no doubt, the thing is only made unlawful, if done otherwise than in a certain manner and without the observance of certain conditions. The penalty, also, imposed by that section, is not (like that under the 15th section) a civil debt, to be recovered by a civil form of proceeding or action, though incurred by what is called an "offence"; but it is a penalty to be recovered "upon a summary conviction before two justices of the peace." The words are added; "and, for the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller." The thing being made universally unlawful, "person" must, I think, there include a corporation, if the sale is made by any apprentice or servant on behalf of a corporation. My Lords, it appears to me that the difference in the substance, as well as the phraseology, of that section from the rest, is such as to make it no rule for the construction of the word "person" in other sections of the Act.

I have now to consider the main argument of the Appellants; namely, that the Act will fail to accomplish its purpose, unless a corporation as well as an individual can be included in these sections. It seems to me, my Lords, that this argument cannot be successfully maintained. The act of selling, the act of compounding, and every other definite and particular act mentioned in the 1st section, and in the sections by which penalties are imposed, are struck at, whether the person who does them is a principal to whom the business belongs, or any one whom he employs to carry on the business. The words, "keep open shop," may, perhaps, not be so; upon those words I will make an observation presently. But that the word "sell" is, and that the word "compound" also is, seems to me clear from that very clause, in the 17th section which I just now read; that "for the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Selborne, L.C.

shall be deemed to be the seller." That, if it does not necessarily mean, beyond all doubt naturally implies, that this is a special construction for the purpose of that particular section, and that it is not to be extended to sales generally, when mentioned in other sections of the Act.

I will add, that regard to the mischief, which beyond all controversy the Act was intended to prevent, leads necessarily to the same conclusion; namely, that he who sells, whether he be master or servant, whether he be the principal or a person to whom the conduct and management of sales is delegated, is struck at by the 15th section; because, otherwise, a very wide door would be opened to the evils which the Act was intended to guard against. If it were otherwise, nothing more would be necessary, according to the Appellants' own argument, than that the business should belong to a person who does not himself carry it on, but who is qualified under the Act; and he might be at liberty to employ in the management of his business persons not qualified, by whom the actual sales would be conducted; and then the public would be exposed to all the dangers which the Act was passed to prevent. The statute, therefore, in order to be effectual, must strike at the particular acts of those who actually conduct the sales, who actually compound the medicines; and it does strike at those acts. No doubt the words "keep open shop" may extend to something more, and comprehend a person who keeps an open shop for the sale of poison, &c., although he may not with his own hands do the business of selling or compounding medicines; one who is only the master or the proprietor of the business, if he be indeed a "person" within the proper construction of the words of the Act. But to say that the construction of the word "person" must be enlarged in order to prevent a corporation from "keeping open shop for retailing poisons," to say that this is necessary for the objects of the Act, appears to me to be really begging the question. "Keeping shop" is prohibited, not as a thing apart from, but as a thing involving the particular acts of sale and compounding, &c., within the shop. If a corporation, though it may keep open shop, cannot itself do these particular acts otherwise than by the agency of persons who come within the Act; if the particular mischief which the public would suffer from the sale of things which ought

not to be sold, and in a manner in which they ought not to be sold, is sufficiently guarded against by the prohibition of such sales, and by the conditions to which they are made subject, the Act seems to be strong enough for its purpose whether a corporation, in whose name and for whose profit the shop is kept open, is included or not.

My Lords, I said at the beginning that I did not regard this matter as free from difficulty, but in such a question of construction, it does seem to me to be best to remember the principle, that the liberty of the subject ought not to be held to be abridged any farther than the words of the statute, considered with a proper regard to its objects, may require. It was open to Her Majesty's subjects before this Act passed to carry on the business of chemists and druggists, using the title of chemists and druggists for the purpose of that business, and to keep open shop for the sale (amongst other articles) of poisonous drugs, &c. It was perfectly lawful to do that by means of a company incorporated under the *Joint Stock Companies Acts*, and there is nothing to shew that the Legislature had any ground for assuming that there could be no such companies. In point of fact, there was at least one great and leading company of sellers of drugs, or "pharmacopolists," incorporated as long ago as the reign of *James* I., to whom, by the *Apothecaries Act*, the Legislature had given large disciplinary powers over other persons carrying on that business, and in whose name (as is admitted) the business of selling drugs had been carried on by their authority, (though not, as it would seem, for their profit,) and continues to be so down to the present time. That having been the state of the law and the facts, I think it would be wrong for your Lordships, without necessity, to impose upon the word "person," used in such a context as that in which you find it here, a construction which might render illegal that mode of carrying on the business of chemists and druggists by such corporations, although there is no direct reference from the beginning of the Act to the end to any such bodies, or to that kind of case; more especially when you do find in the Act, in the 16th section, a special provision for individuals carrying on that kind of business who might die, and whose executors or trustees, not being themselves qualified, might desire to carry it on after

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Selborne, L.C.

their deaths. It is true that the Legislature has, in that case, required for the benefit of the public this safeguard, that there shall be an assistant duly qualified; but the Legislature shews that, having that case in view, it was not thought necessarily inconsistent with the object or the policy of the Act, that the principals or proprietors of the business, the persons deriving profit from it, to whom those actually selling the drugs would be responsible, might be unqualified persons, provided that there was in the business a duly qualified assistant. It by no means follows that all the drugs would necessarily be sold by that duly qualified assistant; or that he might not be, as in this case, under the general superintendence of a manager not himself duly qualified; all that is left open. It is, at least, not thought indispensable that the persons carrying on every such business should themselves, without exception, be duly qualified.

If, my Lords, there had not been adequate safeguards against the sale of poisonous drugs in a manner contrary to the provisions of the Act by the persons actually carrying on the business for a corporation, then I think the argument would have been extremely strong against corporations being permitted to carry on the business at all; but where you find that there are such safeguards, and that every one whom they employ will be penally answerable, if he sells or compounds poisons or other medicines without having the qualification required by, or without complying with the provisions of, the Act, I am unable to conclude that the purposes and objects of the Act require a larger construction to be placed upon the word "person" in the 1st and 15th sections than that placed upon it by the Court of Appeal. I therefore advise and move your Lordships that this appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. The question really, I think, when it is cleared of all superfluity, is reduced to a very short point, but I agree that it is one which is not free from difficulty. The difficulty which I feel about the case is not, generally, upon those things which seem to have troubled most of the members of the Court below. I own I have no great doubt myself, for

instance, that the word "person" may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a "person" does not include an artificial person, that is to say, a corporation. Nobody in common talk if he were asked, Who is the richest person in *London*, would answer, The *London and North-Western Railway Company*. The thing is absurd. It is plain that in common conversation and ordinary speech, "a person" would mean a natural person: in technical language it may mean the artificial person: in which way it is used in any particular Act, must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might shew in which way the word is to be construed in an Act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that, whenever you can see that the object of the Act requires that the word "person" shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly.

My Lords, before I go farther I may say that my view of the matter is that it is the question of what the word "person" means in this particular Act that gives rise to the whole difficulty in the present case. But I may also say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the learned Judges in the Court below. If this word does include a corporation—I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice *Bramwell* said, or is

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Blackburn.

6 QBD 702

reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for a libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case. If you could get over the first difficulty of saying that the word "person" here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested.

But, my Lords, my conclusion, looking at this Act, is that it is clear to my mind that the word "person" here is so used as to shew that it does not include a corporation, and that there is no object or intention of the statute which shews that it is requisite to extend the word to a sense which probably those who used it in legislation, were not thinking of at all. I do not think that the Legislature was thinking of bodies corporate at all. Beginning with the preamble the Act says, "Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business." Stopping there it is quite plain that those who used that language were not thinking of corporations. A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself. The metaphysical entity, the legal "person," the corporation, cannot possibly have a competent knowledge. Nor, I think, can a corporation be supposed to be a "person known as a chemist and druggist." The Legislature was not thinking of a corporation at that moment, but said in the preamble that henceforth it was desirable that those who kept open shop for the sale of these drugs, those who were known as chemists and druggists, should have a competent knowledge, and it afterwards appears that the Legislature, those who framed the Act, were persuaded by the *Pharmaceutical Society* (I daresay very rightly) to think that the

best test of having a competent knowledge was that they should be members of that society.

The Act then goes on, in the 1st section, which is I think really very important, to say that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of 'chemist and druggist,' or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of *Great Britain*, unless such person shall be a pharmaceutical chemist, or a chemist and druggist." Now, my Lords, standing there, it does seem to me, though without laying down any technical rule, that the plain meaning of the words is, and they are used in this sense—such a person as could become a pharmaceutical chemist. A corporation could not; an individual can. It seems to me, therefore, that the Act plainly says in the 1st section, "It shall be unlawful to sell or keep open shop or assume the name of a chemist or druggist for any person," that is to say, any natural person, "unless he becomes a pharmaceutical chemist."

The 15th section imposes a penalty; and the 15th section in imposing the penalty repeats the words which make the thing unlawful. I think those two sections must be construed together and looked at together.

Now, is there anything here in the context, or in the object, to shew that we must take that word "person," which I think must have been used by those who framed the Act, and understood by the Legislature, as meaning a natural person, is there anything requiring us to extend it so that it will apply to a corporate person? I cannot see that there is. If there had been anything in the Act throughout, or anything in the nature of things, which made it reasonable that it should be provided that all the profits to be derived from selling poisons or poisonous drugs should be shared amongst those who were pharmaceutical chemists, and that nobody else should meddle with that trade, if there had been anything of that sort, then, in order to carry out that object of the Act it would be necessary to say that the word "person" did include a corporation, and not a natural person only. But that object is certainly not avowed upon the face of the Act. Whether any of those who promoted the Act had or had not such an idea in their minds, I

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Blackburn.

cannot tell; but they have not brought it forward, or put it in such words as to lead the Legislature to think that they were doing it. And if it had been boldly said: "Bodies corporate and joint stock companies shall not deal in drugs," or, if you like, "in poisonous drugs, unless they have paid black mail to us the *Pharmaceutical Society*," I think it is exceedingly improbable that the Legislature would have enacted that. At all events they have not said that in distinct terms if they did mean it.

Now, is there anything in the object of the Act here which would require that we should so read the Act? I quite agree that a body corporate may keep an open shop, and no mischief is done, if for the purpose of conducting the sale of drugs they keep qualified assistants, and if those qualified persons perform or superintend the sale. There I see no harm that can arise. But no doubt the Legislature, for what reason it is for those who passed the Act to say, have thought it best to say that a "person," which I take to be a natural person, shall not only not sell, but shall not keep an open shop for the sale. I myself think that probably one reason for that was to facilitate convictions, and another may have been that it was thought if there is a person who keeps a shop, who is unqualified, he may have a qualified assistant, and he will be able to overrule the qualified assistant at any moment he pleases, and there may be danger in that. At all events those would be intelligible motives. But neither of those motives applies in the case of a corporation, for the corporation, the body corporate itself, could not interfere, and however much and however little the body corporate may be unqualified, its being so would not affect the matter at all.

Then, my Lords, comes another objection. It is said, if you put that construction upon it you defeat the Act altogether. That I cannot agree to. I hold distinctly that there can be no sale, whether a corporation be the ultimate vendor or not, unless a "person"—meaning a natural person—manages the sale, and that natural person if unqualified would, in my mind, clearly become liable to the penalty under the Act; and, although I am not so clear about this, I feel strongly inclined to think that if a corporation, or anybody else, caused an unqualified person to conduct sales, if it could be brought home to them and shewn that they

did deliberately cause a person who was unqualified to conduct sales, they would be liable to the penalty under sect. 15, because *qui facit per alium facit per se.* I do not however say that as a certain thing, but I think it necessary to say that, because in the argument it was repeatedly assumed that if "person" was here to be construed natural person, a corporation was out of this Act altogether, which is not at all my *ratio decidendi.* I say that a corporation is entirely out of the clause which prohibits persons keeping an open shop, but I do not go farther than that and say anything more.

My Lords, I do not think that there were any other of the sections of the Act, or any of the cases cited, or any general legal principle, which requires any notice to be given to them. It seems to me that the case comes round after all to this, Does "person," which may include a corporation, include it here? For the reasons I have given I think it does not. Then is there anything in the context or anything in the object of the Legislature which requires that although the word "person" would not so properly include a corporation, yet in this particular case we should extend it and make it include a corporation? I think there is not in this section. In sect. 17, which has been alluded to, there is sufficient reason for doing so, but in sects. 1 and 15 I think there is not.

Therefore, my Lords, I agree in the motion which has been made by the noble and learned lord on the woolsack.

LORD WATSON:—

My Lords, it is impossible to disguise the fact that this statute is characterized by great ambiguity, and I would almost go the length of saying, confusion of language. That probably arises from the circumstance that the framers of this Act were dealing with two separate matters; the one, the improvement of a society called the *Pharmaceutical Society*, and the other the regulation of the sale of poisons generally throughout *Great Britain.* That society had existed from 1843, when it was incorporated by a Royal Charter for the avowed purpose of "advancing chemistry and pharmacy, and promoting an uniform system of educating those who should practise the same," and also for the protection of those who carry on the business of chemists and druggists. In the year

H. L. (E.) 1880

PHARMACEUTICAL SOCIETY v. LONDON AND PROVINCIAL SUPPLY ASSOCIATION.

Lord Watson.

1852, the Legislature, by the statute 15 & 16 Vict. c. 56, made various improvements in the constitution of the body upon a recital that it was "expedient to prevent ignorant and incompetent persons from assuming the title of or pretending to be pharmaceutical chemists or pharmaceutists in *Great Britain*."

But when you come to the Act of 1868, the Act with which we are dealing, you not only have farther improvements made in the character of the body and its constitution, but you have very important changes made in the position and the privilege accorded to their body by statute. Down to 1852, and subsequently to 1852, they had no special privilege—nothing in the nature of monopoly or exclusive privilege—and the Act of that year was simply intended, not to prevent other persons from dealing in drugs of any description, but to prevent other persons, when dealing in drugs, from assuming the title to which the members of the society alone were entitled. But when you come to the Act of 1868, the provisions of that statute undoubtedly give to the members of the *Pharmaceutical Society* the sole right to sell drugs, as individuals, or to keep open shops for the sale of poisonous drugs, as individuals, because all individuals who are not possessed of the qualification of membership of the society, or who have not passed the requisite examination and have their names upon the register, are prohibited under penalties from dealing by retail in those articles.

Now, my Lords, I must say that when I come to deal with what is called the intention of the Legislature, I say it with all respect, I find the greatest possible difficulty in making up my mind as to what it should be held to be. I think that the considerations of policy on either side are pretty evenly balanced—in fact, I should be almost inclined to hold that the considerations of policy rather preponderate in favour of the Appellants' argument. But that is not enough. It is not enough for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing or might deal in poisonous drugs; or whether, having this in view, he framed this Act for the purpose of subjecting them to certain disabilities.

I can only look, my Lords, at the language which the Legislature has employed in the enacting sections, sections 1 and 15, and

I can only say this, that even if I was satisfied that it had been the intention of the framer of these two sections to give to individuals registered under the Act, the exclusive privilege of selling poisonous drugs by retail, and to impose penalties on corporations keeping open shop for that purpose, I must say I come to this conclusion that it would have been a very simple thing for the Legislature to have said so in express terms, and I, for my own part, am quite satisfied, apart from those considerations which have led your Lordships to put another construction on the terms of the statute, that the framer of it, if that was his intention, has entirely failed to use language adequate for the purpose he intended to attain.

Judgment under appeal affirmed, and appeal dismissed with costs.

Lords' Journals, 22nd July, 1880.

Solicitors for Appellants: *Flux, Slade, & Co.*
Solicitors for Respondents: *Crouch & Spencer.*

[HOUSE OF LORDS.]

H. L. (E.) 1880

June 29; *July* 1, 2, 23.

THE STOOMVAART MAATSCHAPPY NEDERLAND . . . . . } APPELLANTS;

AND

THE DIRECTORS, &c., OF THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . . . . } RESPONDENTS.

[THE VOORWARTS. THE KHEDIVE.]

Regulations for Preventing Collisions at Sea—36 & 37 *Vict. c.* 85, *s.* 17.

The "Regulations for Preventing Collisions at Sea," made under the authority of the *Merchant Shipping Acts*, 1854 to 1873, must, under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance.

The *K.* and the *V.*, two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The *K.* alleged that when the two vessels were fast approaching each other the *V.* improperly changed its course; that the master of the *K.* could not rely on the *V.* taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the Regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the *K.* to be excused under the circumstances of the case, and had given judgment against the *V.* On appeal to this House:—

Held, that the Statutes and the Regulations had not left the master of the *K.* a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger, he had disregarded the Regulations, and consequently that the *K.* must be held in part responsible.

The judgment of the Court of Admiralty was restored.

THIS was an appeal against a decision of the Court of Appeal which had varied a previous decision of the Court of Admiralty. The Appellants were the owners of the steamship the *Voorwaarts*, the Respondent were the owners of another steamship, the *Khedive*.

The *Voorwaarts* was a screw steamship of about 3000 tons register, the *Khedive* was a screw steamer of about 3740 tons register. The question related to the liability of the owners of one or the other vessel in respect of a collision between them, which occurred on the 23rd of March, 1878, off *Muka Head*, in the island of *Penang*. The evidence was, as usual, of a contradictory character as to the original cause of the mischief, but the general effect was that while both vessels were approaching each other nearly on opposite lines or courses, a fault in steering was committed, the *Khedive* laying the blame on the *Voorwaarts*, and the *Voorwaarts* insisting that the *Khedive* was in fault. Each seemed to be in doubt as to the movements of the other, and when the two vessels were in dangerous proximity the master of the *Khedive* ordered his engineers to stand to their engines, then starboarded the helm, and then stopped and reversed the engines; immediately after which the collision occurred. The facts are stated in detail in the judgment of Lord *Blackburn*. The Court of Admiralty had treated both vessels as having been in fault, and judgment was given in accordance with that view under the provisions of the 36 & 37 Vict. c. 85, s. 17. On cross appeals the case was heard before Lord Justices *James*, *Brett*, and *Cotton*, and after time taken to consider, Lord Justice *Brett* delivered the judgment of the Court to the effect that the danger of collision had been brought about, in the first instance, by the negligence of those on board the *Voorwaarts*, and that the finding of the Court of Appeal on full consideration of the evidence was that the master of the *Khedive* ought, on seeing the danger of collision, at once to have stopped and reversed his engines, whereas he did not do so for an appreciable time (only ordering the engineers to stand by the engines) and that he thereby broke the rule of navigation contained in the 16th Article, but that such a finding was not conclusive, and the Court therefore asked the assessors the following question: "If this order which he gave was not absolutely right under the circumstances, was it such an order as a captain of ordinary care, skill, and nerve might be fairly, as a seaman, excused for giving under the circumstances in which the captain was placed?" This question was answered by the assessors in the affirmative. The Court of Appeal then expressed the

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

opinion that the *Khedive* was not in any way in fault for the collision for which the *Voorwaarts*, having made the original mistake, was solely liable. The judgment of the Court of Admiralty was therefore varied, and judgment was given against the *Voorwaarts*. Hence this appeal.

The Appellants now relied on the 36 & 37 Vict. c. 85, s. 17, which is in these words: "If, in any case of collision, it is proved to the Court before which the case is tried, that any regulation for preventing collisions, contained in, or made under, the *Merchant Shipping Acts*, 1854 to 1873, has been infringed, the ship by which such regulations has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." The Appellants contended that the master of the *Khedive* had disregarded the regulations made under the authority of the statutes for preventing collisions at sea.

The 13th Article was in these terms: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

Art. 14: "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other."

Art. 16: "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

Art. 19: "In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may arise in any particular case rendering a departure from the above rules necessary in order to avoid any immediate danger."

The Solicitor-General (Sir *Farrer Herschell*), and Mr. *Milward*, Q.C. (Mr. *Webster*, Q.C., and Dr. *Phillimore*, were with them), for the Appellants, denied that the evidence shewed the *Voorwaarts* to have been originally in fault, but even assuming that to be the case, it was quite clear that the collision itself had been occasioned by the *Khedive* not strictly observing the Regulations and stopping

and reversing. Instead of that, the helm of that vessel had been starboarded when the two vessels were very near each other, and the collision had been the consequence of that error. The Regulations for Preventing Collisions had not been observed, and there was not here, within the terms of the 36 & 37 Vict. c. 85, s. 17, sufficient to shew to the satisfaction of the Court that the circumstances of the case made a departure from the Regulations necessary: *The Hibernia* (1); *The Fanny Carvill* (2).

Mr. *C. P. Butt*, Q.C., and Mr. *Watkin Williams*, Q.C. (Mr. *E. C. Clarkson*, was with them), for the Respondents, contended that the evidence shewed that the *Voorwaarts* had committed the original error, had not kept a good look-out, and at the last had pursued so doubtful a course as to leave the master of the *Khedive* uncertain what to do, and he had therefore done the best in his power by ordering his men to stand by the engines and be ready, and, as soon as he thought he knew the course the *Voorwaarts* would take, had given orders for the instant reversal of the engines, and they had been instantly reversed. He had therefore done what he could to prevent the collision, and the answer given to the Court by the naval assessors was a full justification of his conduct. There were sufficient circumstances in this case to excuse the want of a literal observance of the Regulations: *The Magnet* (3).

The *Solicitor-General*, in reply.

LORD BLACKBURN:—

My Lords, there had been cross appeals here, and the judgment of the Court of Appeal varied a judgment of the Admiralty Division.

The *Voorwaarts*, a large steamer belonging to the Appellants, came into collision with the *Khedive*, a large steamer belonging to the Respondents, in the channel that lies north of the island of *Penang*. Both sustained heavy damage, and each asserted that the misfortune was wholly to be attributed to the misconduct of the other vessel, and that their own vessel was free from blame.

(1) 2 Asp. Mar. Law Cas. 454.
(2) Ibid. 478; Law Rep. 4 A. & E. 422; on appeal, 2 Asp. Mar. Law Cas. 565.
(3) Law Rep. 4 A. & E. 417.

H. L. (E.)
1880
STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.
Lord Blackburn.

The claim and counter-claim were tried before the Judge of the Admiralty and two nautical assessors. The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth. But he did not think it necessary to say which story was true. For, taking the evidence given on behalf of the *Voorwaarts* to be honest, he and his assessors came to the conclusion that the conduct of the second officer, who was in charge, seeing a steamer approaching in an opposite direction, relinquishing such charge to the third officer, at the very time when his vessel was actually manœuvring, and going below to his dinner, was very reprehensible; and that the *Voorwaarts* was to blame for want of a proper look-out (which, looking at the evidence, I understand to mean a proper look-out during the time the third officer was in charge), and for not stopping her speed after the change from red light to green; (which of course means, even on the supposition that there was such a change on the part of the *Khedive*, and that the evidence on the other side, which denied that there was any such change, was not trustworthy). He then adds (1): "With respect to the counterclaim of the *Khedive*, we are of opinion that it is unnecessary to consider whether the statements of her witnesses with respect to the bearing of the lights, especially of the green light of the *Voorwaarts*, be or be not accurate, for we think that the provisions of Article 16 of the Regulations for Preventing Collisions at Sea apply to the *Khedive* as well as to the *Voorwaarts*, and that the *Khedive* ought, in the circumstances, to have stopped and reversed, or at least slackened her speed, at a distance and at a time which would have prevented the collision. The policy and principle of the rule in question is clearly to inculcate the necessity of immediately taking the speed off the vessel when in such proximity to another vessel as to render a collision probable. I therefore pronounce both vessels to blame."

Both parties appealed to the Court of Appeal, which also was

(1) The case in the Court below appeared to be one wholly depending on the evidence of facts, and therefore was not reported. The quotations here introduced are taken entirely from the printed papers of the parties.

assisted by nautical assessors. The Judges of Appeal did inquire into the question which the Court below had thought it unnecessary to consider. They came to the conclusion that the facts were more accurately described by the witnesses for the *Khedive* than by the witnesses for the *Voorwaarts*, and that the vessels were at least three and a half miles apart, were approaching each other green light to green light, with so large a bearing as to make it certain that if both kept their course they would have passed without any danger of a collision. Lord Justice *Brett*, in delivering the judgment of the Court of Appeal, says: "We are of opinion that those vessels continued to approach each other in that way till they were within the vicinity of each other, not farther at the most than a mile from each other. Probably they were somewhat less than a mile, and being in that position, green light to green light, starboard bow to starboard bow, on opposite and parallel courses, at so short a distance as that, the *Voorwaarts* suddenly put her helm hard-a-port, and so came suddenly towards the other ship, which up to that moment had been in a state of safety. Up to that moment there was no occasion whatever for the other ship to have slowed its speed or altered its manœuvres in any way. The *Khedive* was perfectly justified up to that moment in continuing at full speed, because the vessels were so approaching that there was no danger of collision if they had kept on, but the master of the *Voorwaarts*, from want of look-out, probably, and then from fear of suddenly finding himself in the vicinity of another ship, performs the wrong manœuvre, the absolutely wrong manœuvre—he puts his helm hard-a-port. It was noticed by those gentlemen who advised us that this was not merely caused by his want of look-out, but by his want of presence of mind; but there was also a want of due care in navigation in this case, that a superior officer to him having been on the deck at the time the steamers were approaching each other, left it, whereas in their judgment, in which we entirely agree, a senior officer, when ships are approaching in that way, ought not, being on the deck, to have left it. However that may be, there was an absolutely wrong manœuvre by the *Voorwaarts*, bringing the ships from a state of safety into one of sudden and imminent danger. The captain of the *Khedive*, on seeing this manœuvre, gave orders to put his own

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

helm hard-a-starboard, and at the same moment he gave the order to stand by the engines. He did not at that moment give the order to stop the engines, or to reverse them at full speed. The helm was put hard-a-starboard, the engineer did stand by the engines; it was not for the space of a minute, or perhaps somewhat more than a minute, that the captain of the *Khedive* ordered the engines to be stopped and reversed at full speed. Directly that order was given they were stopped and reversed at full speed and they were reversing at full speed at the moment of the collision. The engines of the *Voorwaarts* had not been stopped even, but were going full speed ahead until the two ships were in collision. That the *Voorwaarts*, therefore, was to blame, and greatly to blame, cannot be doubted. The question must remain whether those on board the *Khedive* were guilty, within the rule that I have endeavoured to enunciate, from a want of ordinary care and skill in what they did. We are advised, and we are of opinion, that up to the time when the *Voorwaarts* put her helm hard-a-port and brought the ships into sudden danger, there was nothing wrong on the part of those who were in command of the *Khedive*, or of those on board of her. We are advised, and are of opinion, that under the circumstances and in the position of those two ships, it was quite right that the helm of the *Khedive* should be put hard-a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard-a-starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great danger of collision; it is obvious, therefore, that the rule of navigation applied, unless there were something which made it necessary for the safety of the navigation that the rule as to stopping and reversing should not be acted upon. Upon that, of course, we are bound to consult the gentlemen who advise us, and the question which we put to them was, 'Was it a right manœuvre, under the circumstances, on the part of the captain of the *Khedive* to order the engineers to stand by the engines, or was the right manœuvre then to order the engines at once to be stopped and reversed?' The answer was, as might have been expected, that the right manœuvre would have been to order the engines at once to be stopped and reversed."

My Lords, at your Bar there was a lengthened argument on the evidence; the counsel for the Appellants urging every argument that could be produced to lead your Lordships to draw the conclusion that the *Voorwaarts* was not to blame, to the extent at least to which the Court of Appeal thought she was, or at least that the *Khedive* was not free from blame up to the time when the *Voorwaarts* put her helm hard-a-port. I should not, even if my own judgment would have been the other way, like to differ on a question of fact from those who had the assistance of nautical assessors; but as far as I am able to form an opinion, I agree with the Court of Appeal. I will indicate the principal reason why I do so. There is a conflict of testimony on this point. The second officer says, that exactly at 7·30, that is about fifteen minutes before the collision, he saw a blue light from the *Khedive*, and almost at the same instant, and just before the third officer relieved him, he had passed the order to port, having just then, as he says, seen the red light about half a point on his starboard bow, and, as he judged, four or five miles off. But it was not on that account that he gave the order to port, but because his vessel had fallen a couple of degrees to the west of the course he was steering W. ½ N., and he ordered the helm a little bit to port to bring her back to her course. The third officer who was coming up to relieve him thought the order to port was not heard, and repeated it loudly. This brought out the captain, who also says he saw the red light, but on his port bow, and the chief officer, who was there, but not on duty, also says that he saw the red light on the port bow. It is to be observed that neither the captain nor the chief officer stayed long enough to have more than a glimpse of this red light, but still there were four witnesses who say that they then saw the red light, and if they are believed, the head of the *Khedive* must at this time have been more towards the *Voorwaarts* than the captain of the *Khedive* had desired, for when he ran down towards the white light, which he then thought might be the stationary light of a pilot boat, he gave orders that it should be kept half a point in the starboard bow, and he thought this order was obeyed; but I do not myself think it improbable that the vessel did for a short time head a point farther south than was intended. But even if the third officer was right in thinking that at this time the

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

Khedive, then at a considerable distance, shewed her red light, that would in no way exonerate him from the obligation to keep a good look-out on the *Khedive's* lights whilst they were approaching nearer, and it was on the manœuvres of the two ships, during the ten minutes or so that elapsed between the time when the third officer was left alone in charge and the time when he gave the order to put her helm hard to port, that all depended. The case of the *Khedive*, which the Court of Appeal believed, was that when the blue light was burnt out the vessels were six or seven miles apart, which is farther apart than the officers of the *Voorwaarts* say, and that the head of the *Khedive* was immediately put on her old course E. ½ N., whilst they watched the lights of the *Voorwaarts* and first saw for an instant the red light of the *Voorwaarts* and directly after her green light, the vessels being then about six miles apart and the time about 7·28. Then the helm was put to starboard, and the vessel's head brought to E.N.E., the green light of the *Voorwaarts* being seen two and a half to three points on the starboard bow; and then the vessels for ten or twelve minutes continued to run nearly parallel, green light to green light, till the *Voorwaarts* suddenly shewed her red light, being then half a mile to three quarters of a mile off. If this is accurate, the conclusion is irresistible that the third officer of the *Voorwaarts* had kept no look-out at all during these ten minutes, having taken it for granted that the *Khedive* was continuing with her red light towards him, until he suddenly saw the green light and then lost his presence of mind and did the very worst thing he could do. The third officer says he did keep a look-out, and that the *Khedive's* red light continued visible till a blue light was burned on board the *Khedive;* that whilst it was burning the lights of the *Khedive* were obscured, and when the light went out he saw the green light and immediately put his helm hard to port. The *Khedive* did, it is admitted, after its first blue light proved a failure, burn a second blue light, but this was done whilst they were yet uncertain whether the white light of the *Voorwaarts* was the moving light of a steamer or the stationary light of a pilot boat, and therefore whilst the vessels were several miles apart. If the third officer speaks true the second blue light was burned when the vessels were within a mile of each other. This I think incredible. I do not know if all the

noble and learned Lords who heard the argument agree with me in attaching so much weight to the time when the blue light was shewn, but I believe they all agree that this House must act on the opinion of the Court of Appeal, that the *Khedive* was not to blame until after the collision was imminent, or perhaps I should say inevitable.

But there arises a question of great general importance, on which the Judges of Appeal have reversed the judgment of the Court of Admiralty. In what follows I assume the story of the witnesses of the *Khedive* to be the truth, and that everything done by the *Khedive* was right until the *Voorwaarts* suddenly ported, being then within three quarters of a mile. Captain *Steward* gives this evidence in chief. He saw the red light. "Mr. *Butt*: How did she bear on your starboard bow at that time?—*A.* About three points. *Q.* Did you give any order?—*A.* Yes. *Q.* What was it?—*A.* Hard-a-starboard. *Q.* What would have happened supposing you had hard-ported instead?—*A.* We should have come nearly stem on. *Q.* In other words, was it in your judgment safe then to port?—*A.* My professional judgment was that it was not safe to port. *Q.* And you gave the order hard-a-starboard?—*A.* Hard-a-starboard. *Q.* Did she keep her red in view, or did you ever see the green again before the collision?—*A.* No; kept the red in view. *Q.* Besides ordering hard-a-starboard, did you give any other order?—*A.* Stand by below, stand by the engines. *Q.* When was that given?—*A.* At the same time that hard-a-starboard was given. *Q.* What was your next order?—*A.* About a minute later I gave the order to full speed astern. *Q.* Did you judge at the time you gave the order full speed astern that the collision could be avoided or not?—*A.* I considered it inevitable then. *Q.* When you ordered your helm hard-a-starboard, with what view did you give the order?—*A.* With the view of endeavouring to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision. *Q.* I presume you knew when she changed from green to red what helm she was under?—*A.* Yes. *Q.* What was it?—*A.* Evidently hard-a-port. *Q.* You have said that you gave the order afterwards to reverse your engines, or put them full speed astern; was that order obeyed?—*A.* It was, the telegraph answered immediately."

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

And afterwards on cross-examination: *Q.* "You say that you ordered 'hard-a-starboard,' and you at the same time ordered the engineers to stand by?—*A.* Yes; to stand by. *Q.* Is that so, at the same time?—*A.* At the same time. *Q.* You had seen then that the *Voorwaarts* was porting?—*A.* Yes. *Q.* And, according to your account, porting suddenly?—*A.* Porting suddenly. *Q.* Was that the only order which you then gave to the engines, to stand by?—*A.* That was the first order that I gave to the engines. *Q.* Was that the only order you then gave?—*A.* At that moment, yes. *Q.* Then your engines continued until a minute later 'full speed ahead'?—*A.* Yes, two minutes later. *Q.* Then two minutes after you saw she was porting you continued your engines full speed ahead?—*A.* Yes. *Q.* What for?—*A.* In the hopes of going off in parallel courses; my head was going off sharp, and I was in hopes by continuing on my course that we should come parallel, or at any rate lessen the force of the collision; the farther I could get off and the longer I could keep on, the more likely it was that we should pass clear. *Re-examined by Mr. Butt:* *Q.* One word upon that last question. You say you kept your engines going ahead for a little time after the order to stand by. She was swinging round under her starboard helm?—*A.* Starboard helm. *Q.* Will she continue to swing round faster under that starboard helm if you stop her, or if you keep the engines going ahead?—*A.* Keeping the engines going ahead she would swing faster; the greater the speed the faster she obeys the helm. *Q.* Whatever the other ship did, you did stop and reverse before the collision?—*A.* Yes, a minute. *Q.* And you were going astern at the time of the collision?—*A.* Yes."

This evidence I accept as quite accurate. The phrase "a minute" in the examination-in-chief and "two minutes" in the cross-examination are no discrepancy. The captain had other things to think of than the precise length of time. *Allan,* who was in the engine-room, and who would have to enter the times in his log, says he looked at the clock in the engine-room, and that by it the order to turn astern full speed was given a minute and a half after the order to stand by the engines, and that the collision was three minutes after the order to stand by the engines.

As I stated before, the Judges of Appeal had the advantage of

having nautical assessors whose advice they could ask on anything the Court thought important. This House has not that advantage, and must act on the answers given to the questions actually asked. The nautical assessors, as appears by what I quoted before, advised the Court of Appeal that the order to put the helm hard to starboard was right; but that the order full speed astern ought to have been given at once; by which I understand them to mean, not merely that to go on full speed was in contravention of the 16th Article of the Regulations for preventing collisions at sea, but that it was bad seamanship in itself; and this was in conformity with the opinion of the Court of Admiralty. But the Judges of Appeal thought this did not dispose of the case; and they asked and obtained the advice of their assessors on a farther question. To avoid any mistake as to what was asked and what was answered, I will read the words of the judgment on this part of the case. After saying that the assessors said that the right manœuvre was not to order the engineer merely to stand by the engines, but the right manœuvre would have been to order the engines at once to be stopped and reversed, Lord Justice *Brett* proceeds, "Therefore at that moment the captain of the *Khedive* did not do what was absolutely the right thing. Moreover, if he did break the rule of navigation by breaking that rule at that moment, there is no doubt that he put the property and the liability of his owners into the greatest jeopardy. We do not desire in the least to encourage the idea that the captain of a steamer when there is danger of a collision with another, should break from this rule to stop and reverse; it is a most valuable rule, and must be obeyed if it possibly can be; and those who disobey it must be made liable for that disobedience unless they can, under very peculiar circumstances, excuse themselves. But, having regard to what I have before stated, we then asked our advisers the following question:—If this order which he gave was not absolutely right under the circumstances (that is, the order only that the engineers should stand by the engines), was that such an order as a captain of ordinary care, skill, and nerve, might be fairly as a seaman excused for giving under the circumstances in which this captain was placed. Those circumstances, as was well known to those who advised us, were that at a

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

distance of not more than a mile the ships were starboard bow to starboard bow, approaching on opposite courses, so as not to involve risk of collision, and at that distance those on board the *Voorwaarts* suddenly put their helm hard-a-port so as to bring them suddenly towards the *Khedive*, and so put the *Khedive* into a position of sudden, unexpected, critical danger. Therefore the question comes to be whether the captain of the *Khedive* being so suddenly placed in such a critical position it can be said that he was guilty of a want of ordinary care and skill under such circumstances in hesitating for the space of a minute whether he would order his engines to be reversed full speed. And I cannot help stating that that hesitation might involve this view, the ships being in such a position, if those on board the *Voorwaarts* had, from doing the wrong thing, resolved in a moment to do the right thing, then it might be that the going ahead full speed of the *Khedive* would give them more room to get right again from what they were doing; but still we are advised, and are of opinion, that he did the wrong thing under the circumstances. But in answer to that last question those advisers have advised us that the captain of the *Khedive* might be, as a seaman, fairly excused for that hesitation of a minute, and if so we are of opinion that, although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that hesitation of a moment (I will not say for a moment—for a minute) to do the best thing he is not to be found guilty of a want of ordinary care, and skill, and nerve under those difficult circumstances in which he was placed. If that be so, those who conduct the case of the *Khedive* have proved that those on board the *Voorwaarts* were guilty of negligence in the legal sense, and have satisfied the Court that those in charge of the *Khedive* were not guilty of negligence or want of ordinary care, skill, and nerve which contributed to the accident. I may say that those who advised us are of opinion that the vessels, when this manœuvre of the *Voorwaarts* was made, were so close that considering the size of the vessels, considering the speed at which they were both then, justifiably, going, considering that they were screw-ships of the largest calibre, and that they were then so close, the circumstances of stopping and reversing, in the opinion of our advisers, would

not have had a material effect on either ship." I may observe that this does not appear to have been the opinion of the Judge of the Admiralty and his assessors, for they say that it might have prevented the collision. Lord Justice *Brett* proceeds: "If so the collision was inevitable when the *Voorwaarts* performed her wrong manœuvre, and if so, even if the captain of the *Khedive* was wrong, he would not be wrong in any manner contributing to the accident. But without differing from those gentlemen, we do not think it right to put this decision quite alone upon that view of theirs—rather upon the other; it being manifest that that view of theirs goes a long way to justify the other view, namely, that if this was done at a time when the vessels was so close, in their opinion a collision was inevitable. If it were not quite inevitable it is obvious that it was done at a time that brought the captain of the *Khedive* suddenly and without warning into a most critical position of danger. It is upon that ruling only that we desire to base this judgment; and on that rule, and on our decision with regard to that rule, we are of opinion that the owners of the *Voorwaarts* are solely liable for this collision, and that damages must be awarded accordingly." Lord Justice *James* added, "The Lord Justice has communicated to us what the judgment would be, we were well aware of it, and I need not say that that is the judgment of the Court. I may perhaps be allowed to add that if a heavy van drives along the street and makes the horse of a carriage unmanageable, I cannot hold that the coachman is to blame if he pulls the wrong rein."

I may observe that the terms in which the question is asked seem to me hardly to do Captain *Steward* justice. He at once, on seeing the red light, took in the situation. He thought, and was right in thinking, that the *Voorwaarts* was crossing his bows, and that within five minutes from that time, if he did nothing, he must come stem on upon her and probably send her to the bottom. He did not hesitate, but at once made up his mind that the best thing to do was to put his helm hard to starboard with a view to endeavour to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision, and in this the nautical assessors say he was right; and as far as I am competent to form an opinion, I should say that if he had not done so

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

the *Voorwaarts* would probably have been sunk, and so that by so doing he probably prevented a great loss of life, and diminished the loss of property. He did not reverse his engines, which was an error; but as I think I must understand the answer of the assessors, was such an error as a seaman might, under such circumstances, commit without proving thereby that he was deficient in care, skill, or nerve; and this the Judges of Appeal thought justified them in reversing the judgment of the Court of Admiralty, and finding the *Khedive* free from blame. I am sorry to be obliged to say that I come to a different conclusion; I feel how hard it is when, on the view I take of the facts, Captain *Steward* shewed so much skill and nerve and did so much good, to say that his owners should be made liable to a heavy payment in consequence of a venial error on his part, but the view I take of the *Merchant Shipping Act*, 1873, 36 & 37 Vict. c. 85, s. 17, is such as to compel me to advise your Lordships that this should be done.

My Lords, in the *River Wear Commissioners* v. *Adamson* (1) I expressed my view of the common law in these terms (2): "That the owner of the injured property must bear his own loss unless he can establish that some other person is in fault and liable to make it good. And he does not establish this against a person merely by shewing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner. But he does establish such a liability against any persons, who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land and a ship on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage, and if he can prove that the person who has been guilty of either stood in the relation of servant to another, and that the fault occurred in the course of his employment, he establishes a liability against the master also." I should add, to prevent possible misapprehension, that although apart from statute law, the duty which the Court casts upon him who has the management and control of a ship at sea is the same as that which the law casts on those who have the management of a carriage on shore, viz., to take reasonable care and to use reason-

(1) 2 App. Cas. 743. (2) Ibid. at p. 767.

able skill to prevent it from doing injury, yet that the different nature of the two things makes a great difference in the practical application of the rule. Much greater care is reasonably required from the crew of a ship who ought to keep a look out for miles, than from the driver of a carriage who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes the command of a steamer than from one who drives a carriage.

Lord Blackburn.

The earlier part of Lord Justice *Brett's* judgment expresses the rule of common law to the same effect, though in other language, and I need not add that so far I quite agree with him. And I agree also in what he says that a man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice *James* gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence.

It was on the application of this last principle that the Court of Appeal reversed the judgment of the Court of Admiralty in the *Bywell Castle* (1). In that case no question arose as to the infringement of any of the statutable directions, and the question was entirely one of degree, how much allowance should be made for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill.

But the Legislature has thought fit from time to time to make enactments as to what vessels shall do; it is obviously desirable that one ship when seeing another should know what it is to be expected that she will do. These directions are to be followed; and to secure that they will be observed the Legislature made provisions which have been varied from time to time. That in

(1) 4 P. D. 219.

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

the *Merchant Shipping Act*, 1854, sect. 298, was in these terms: "If in any case of collision it appears to the Court before which the case is tried that such collision *was occasioned by the non-observance* of any rule," &c., "the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

On the construction of this and similarly worded enactments it had been held in *Tuff* v. *Warman* (1) that though the Plaintiff had infringed the rules, and by his neglect of duty brought the vessel into danger, yet if the Defendant could by reasonable care have avoided the consequences of the Plaintiff's neglect, but did not, and so caused the injury, the Plaintiff could recover, as under such circumstances the collision was not occasioned by the non-observance of the rule. This prevented the statute from producing the effect which those who framed it wished; but nothing was done till attention being apparently called to the subject by the case of *The Fenham* (2), in the *Merchant Shipping Act*, 1873, s. 17 was passed in the following words: "If in any case of collision it is proved to the Court before which this case is tried, that any of the regulations for preventing collisions contained in, or made under, the *Merchant Shipping Acts*, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." The regulations which come into question in this case are, "*Ships under steam to slacken speed*: Art. 16. Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or if necessary, stop and reverse; and every steamship shall when in a fog, go at a moderate speed. *Proviso to save special cases*: Art. 19. In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to

(1) 2 C. B. (N. S.) 740; 26 L. J. (C.P.) 263; affirmed 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

(2) Law Rep. 3 P. C. 212.

avoid immediate danger. *No ship under any circumstances to neglect proper precautions*: Art. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The change made in the language of the enactment cannot have been made without an object, and one object I think must have been to take away what was the *ratio decidendi* in *Tuff* v. *Warman* (1); and another to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence as in *The Fenham* (2).

Since that statute was passed there have been two important decisions of the Privy Council upon its construction, *The Hibernia* (3) and *The Fanny M. Carvill* (4). For some unexplained reason they are not reported in the 'Law Reports.' There has not been, as far as I can learn, any case in the Court of Appeal requiring it to consider the case of the statute till the present, and, most unfortunately, the reasons which induced the Court, in the present case, to pass it over as irrelevant, are not given. It is never satisfactory to come to the conclusion that the opinion of another is wrong without appreciating the reasons which led to that opinion: here your Lordships are forced to do so, for the Court of Appeal has not given those reasons.

In *The Fanny M. Carvill* (4), it is said in the Privy Council, "In construing the clause in question it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for the *Merchant Shipping Acts* of 1854 and 1862. On the contrary, its 2nd section declares that it is to be construed as one with them. Now, the 298th section of the Act of 1854, and the 29th section of the Act of 1862 provide, each, that in certain cases of the infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the

(1) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; affirmed 5 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

(2) Law Rep. 3 P. C. 212.

(3) 2 Asp. Mar. Law Cas. 454.

(4) Ibid. 478; Law Rep. 4 A. & E. 422; on appeal, 2 Asp. Mar. Law Cas. 565.

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Blackburn.

qualification that the collision shall appear to the Court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the Act of 1873 the Legislature omitted this qualification, it must be presumed to have done so designedly, and at all events to have intended that it should no longer be incumbent on the opposite party to prove that the non-observance of the regulations in part contributed to the collision. Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burden of proof by raising a presumption of culpability to be rebutted by proof that the non-observance of the regulations did not in fact contribute to the collision, because the preceding, the 18th section, clearly shews that where the Legislature intended only to raise a presumption capable of being rebutted by such proof, it used apt words to express that intention. Their Lordships therefore conceive that whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not in fact contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence."

The rest of the judgment proceeds on a question not raised by the facts in the present case. But I quite agree in this view of the law, and it renders it unnecessary to consider the last finding of the nautical assessors on which the Court of Appeal did not act, or to inquire whether they or the Judge of the Admiralty took the right view of the fact.

I think farther, that where a sudden change of circumstances takes place which brings a regulation into operation though the thing prescribed by the regulations is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows or ought to have known, and but for his negligence would have known, of the change of circumstances. But it would be doing Captain *Steward* great injustice to say that such was his condition. He at once took in the situation and was aware that there was risk of a collision, and that it was imminent if not inevitable, and he acted with great promptitude and skill, so as

greatly to alleviate the violence of that inevitable collision. But he did not stop and reverse, nor even slacken his speed; and there he departed from the course prescribed by Regulation 16; nor was there anything in the circumstances rendering a departure from this rule necessary in order to avoid immediate danger. Even if it would (in the absence of such a positive rule), be better seamanship to keep way on the ship in order to make her more manageable (which is not clear), the Legislature has thought it better to prescribe the course which must be followed.

I feel (though for the reasons stated before, very sorry for it) obliged to advise your Lordships to allow this appeal and restore the order of the Admiralty.

LORD WATSON:—

My Lords, in this case it is not disputed that about 7.40 P.M., on the 23rd of May, 1878, two steam-vessels of large burthen, the *Voorwaarts* and the *Khedive*, came into collision in the open sea, some miles to the northward of *Penang Island*; and the question to be determined is whether either or both of these vessels must be held responsible for the consequences of the collision.

The accounts given by the witnesses from the two vessels are quite irreconcilable, although they have certain features in common. These are, that the masthead lights of each vessel became visible to the other about twenty minutes, and their side lights at least ten minutes before actual collision, and that, from the time their side lights opened, they continued to approach each other on perfectly safe courses until three or four minutes before the collision, when one of them executed a wrong manœuvre which brought her across the bows of the other; but the witnesses of the *Voorwaarts* state that the vessels were approaching red to red, and that the *Khedive* wrongfully starboarded her helm and shewed her green light on the port bow of the *Voorwaarts*—whereas the witnesses of the *Khedive* allege that they were approaching green to green when the *Voorwaarts* wrongfully ported her helm, and shewed her red light on the starboard bow of the *Khedive*. Again, the witnesses on both sides are agreed that after the vessels had sighted each other the *Khedive* sent up two blue signal lights in succession; but according to the *Khedive*

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Watson.

witnesses, the second of these blue lights had burned out at or before 7.30, whilst according to those of the *Voorwaarts*, the first blue light was not ignited until 7.30, and the second disappeared shortly before the collision, just as the *Khedive* shewed her green light upon the port bow of the *Voorwaarts*.

It appears to be a matter of reasonable certainty, that of these contradictory versions of what took place before the collision, one or other must be substantially true, and in these circumstances I have no hesitation in giving credence to the story told by the witnesses of the *Khedive*, because it is in my opinion the more consistent and the more probable of the two. I do not think it necessary to criticise the evidence in detail, but I shall indicate the main considerations which have led me to form that conclusion.

On board the *Khedive*, three of the ship's officers were on the bridge; the captain and first officer taking charge of the navigation, the fifth officer being stationed on the port side for the purpose of telegraphing the captain's orders to the engineer below, and they all remained at their posts from the time when the bright light of the *Voorwaarts* was first seen until the collision. On board the *Voorwaarts* during that period, a very different state of matters prevailed. When the bright light of the *Khedive* first became visible the captain and second officer were on the bridge, but shortly afterwards the captain went down to his dinner in the chart room leaving the second officer alone in charge. Immediately after seven bells had struck (7.30 P.M.) three of the ship's officers joined the second officer upon the bridge. The third officer, who had dined, came up to relieve the second officer of his watch, in order that he might dine. The captain and the first officer were attracted by an order to "bakbord" or port, which it seems had been given by the second, but was repeated in a loud tone by the third officer. The assemblage dispersed almost as soon as it met. The second officer, although his watch continued until eight P.M., went off to his dinner, the captain returned to his chart-room, whilst the first officer went to change his clothes for the night, leaving the navigation of the *Voorwaarts* from that time until the collision took place in the sole charge of the third officer. The gentlemen of skill in the Admiralty Court

appear to have been of opinion that the conduct of the second officer in relinquishing his charge to one of inferior rank, at a time when his vessel was actually manœuvring in order to keep clear of an approaching steamer, was very reprehensible, and of itself constituted fault on the part of the *Voorwaarts*. Whilst I do not venture to differ from that conclusion, I do not find it necessary to rest my judgment upon it, because, apart from all questions involving nautical skill, I take it to be clear that a consistent narrative by three officers who were present and observing throughout the whole course of events is, *cæteris paribus*, more reliable than an account given by four officers, one of whom was the sole observer during the first half of the period, and another the sole observer during the critical ten minutes preceding the collision, the other two having no opportunity for observation between 7.20 and 7.40 P.M., except on one brief occasion about the middle of the period.

I also think that the account given by the *Khedive* witnesses of the time at which her blue lights were burned is favoured by all the probabilities of the case. The only possible object of her captain in making these signals was to attract the notice of a pilot vessel, or of what he believed to be a pilot vessel. It is certain that there was no pilot vessel in sight, and that what he must have believed to be a pilot vessel was none other than the *Voorwaarts*. Whilst it was perfectly natural that he should mistake the bright light of the *Vorwaarts*, when first seen at a distance of seven or eight miles, for the masthead light of a pilot vessel four or five miles away, it is in the last degree improbable that he should have fallen into that error exactly at half-past seven, the time of sending up the first blue light, as stated by the second officer of the *Voorwaarts*, fully ten minutes after the vessels came into sight of each other: several minutes after their side lights became visible according to the second officer, and when they were only about three or four miles apart according to the third officer of the *Voorwaarts*. And if it be once conceded that the *Khedive's* account of these blue lights is the correct one, the story told by the third officer of the *Voorwaarts* of what occurred during the ten minutes preceding the collision, becomes absolutely incredible.

H. L. (E.)
1880
STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.
Lord Watson.

But, assuming it to be proved, as I think it is, that the *Voorwaarts* was guilty of fault in unjustifiably steering across the bows of the *Khedive*, the Appellants contend that the *Khedive* must also be held to have been in fault, and that the decree of the Judge of the Admiralty Division ought therefore to be restored. They do not assert that the officers navigating the *Khedive* were guilty of negligence or fault in the sense of the common law; but they do assert that the *Khedive* infringed the 16th Article of the Regulations for Preventing Collisions at Sea, by failing to slacken speed, or stop and reverse, at a time when the vessels were in imminent danger of collision. And they maintain that, under the provisions of sect. 17 of 36 & 37 Vict. c. 85, the legal consequence of such infringement is that, for the purposes of the present case, the *Khedive* must be deemed to have been in fault.

The facts of the case bearing upon this question are shortly these, that the *Voorwaarts* having, a few minutes before the collision, suddenly opened her red light upon the starboard bow of the *Khedive*, the captain of the *Khedive*, at 7.37 P.M., starboarded his helm with the view, as he states, "of endeavouring to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision," and at the same time signalled to his engineer to "stand by;" that at 7.38½ P.M. the captain, considering that collision was then inevitable, gave the order to stop and reverse, which was promptly obeyed, and that the engines of the *Khedive* had been going full speed astern for nearly a minute when the vessels collided at 7.40 P.M.

What effect the *Khedive's* maintaining her full speed for the minute and a half intervening between the orders to "stand by" and to stop and reverse, had in the collision, it is not easy and perhaps not necessary to ascertain with any degree of precision. The gentlemen of skill who assisted the Judge of the Admiralty Court seem to have advised that the *Khedive* "ought, in the circumstances, to have stopped and reversed, or at least slackened her speed, at a distance and at a time which would have prevented the collision." Seeing that the *Khedive* could not be under any possible duty to slacken speed so long as the vessels were approaching each other green to green, that finding appears to me to imply that, in the opinion of these experts, the collision might have

been avoided if the captain of the *Khedive* had stopped and reversed, or even slackened speed, at the time when he starboarded and gave the order to stand by. The gentlemen who advised the Court of Appeal appear to have been of opinion that at the time when the *Voorwaarts* made her wrong manœuvre the vessels were "so close that the circumstance of stopping and reversing would not have had a material effect on either ship." The result of these views seems to be that it is not possible to determine, with any degree of certainty, what the effect of the unexecuted manœuvre would have been; but that it is certain that it would have been to some appreciable extent beneficial.

The experts in the Court of Appeal are of opinion that the absolutely right manœuvre on the part of the captain of the *Khedive* would have been to stop and reverse immediately after the red light of the *Voorwaarts* was seen. They are of opinion that the captain did, for the minute and a half after that light became visible, adopt not the better, but the less expedient manœuvre, although they do not think the adoption of the better would have materially affected the collision.

I must now advert to those statutory provisions in respect of which it is contended that the *Khedive* must be deemed to have been in fault. The enactments especially founded on by the Appellants are to be found in Article 16 of the Regulations embodied in the Act of 1862, and sect. 17 of the *Merchant Shipping Acts Amendment Act* of 1873. In construing these enactments, I think it may be useful to consider what has been the course of legislation for the avowed purpose of preventing collisions at sea.

The *Merchant Shipping Act* of 1854 (17 & 18 Vict. c. 104), enacted certain rules in regard to lights, fog signals, and the courses to be steered by vessels meeting and passing each other, and for enforcing the observance of these statutory rules it was provided (sect. 298) that where, in any case of collision, it appeared to the Court that the collision was occasioned by the non-observance of any of them, the owner of the ship by which the rule was infringed should not be entitled to recover any recompense for the damage sustained by his ship, unless it were shewn to the satisfaction of the Court that the circumstances of the case

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Watson.

rendered a departure from the rule necessary. The Legislature had not, as yet, made any regulation touching the speed of meeting vessels.

The Amendment Act of 1862 (25 & 26 Vict. c. 63), repealed by sect. 2, and relative Table A., the rules and also sect. 298 of the Act of 1854, and by sect. 25 and relative schedule C., enacted a new code of regulations for preventing collisions at sea, power being given to Her Majesty to alter or add to them, from time to time, on the joint recommendation of the Admiralty and the Board of Trade. The 16th article of the regulations, which is still in force, provides that "every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate pace."

By sect. 29 of the Act of 1862 it was enacted that "if in any case of collision it appears to the Court before whom the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

The Amendment Act of 1873 (36 & 37 Vict. c. 85), made no change upon the regulation as to speed, but it repealed (sect. 33) sect. 29 of the Act of 1862, and in lieu thereof enacted (sect. 17) as follows: "If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collisions contained in, or made under, the *Merchant Shipping Acts*, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

I think it is impossible, upon a careful consideration of these successive enactments, to avoid the inference that the legislature did not intend, in certain specified circumstances, to leave mariners to decide for themselves, but on the contrary, intended to prescribe rules to be observed by all in these circumstances; and that no one was to be excused for non-compliance, or exempted from the

statutory consequences of non-compliance with the rules, in circumstances to which they were applicable, unless he could bring himself within a statutory exception. I am also of opinion that in enacting these regulations, and in fencing them with provisions as to the consequences of non-observance, the Legislature was not declaring or even relying upon any known principle of law, but was deliberately creating many new duties, with correlative responsibilities, unknown to the common law. It is farther apparent that the repeal of sect. 29 of the Act of 1862, and the substitution for it of sect. 17 of the Act of 1873, must have been intended to increase the stringency of the statutory regulations.

The interpretation of sect. 17 of the more recent Act, so far as required for the decision of the present case, does not appear to me to be attended with difficulty. If a vessel at or about the time of collision with another, infringe a statutory rule which was in the circumstances applicable, and if it be not established that a necessity existed for departing from the rule, the vessel so infringing must, in terms of the statute, be held to have been in fault. Now on the assumption that the *Khedive* did infringe article 16 of the Regulations, it has not been suggested, and it is certainly not proved, that the captain of the *Khedive* was constrained to depart from it by any necessity, real or supposed; and if that which I have assumed were conceded, I should have no hesitation in applying the provisions of sect. 17 to the case, and holding that the *Khedive* was in fault. It therefore becomes necessary to consider whether the 16th Regulation was or was not infringed by the *Khedive*.

Apart from statutory qualifications or exemptions, to which I shall immediately refer, it does not seem doubtful that during the period of a minute and a half which elapsed between the order to "stand by" and the order to stop and reverse, the *Khedive* was within the rule established by the 16th article, and disobeyed it. At the time the order to "stand by" was given, the two vessels were not only approaching each other, "so as to involve risk of collision," but were seen and known to be so by the captain of the *Khedive*. Had it been possible to hold, upon the evidence, that the period in question was so brief, and the *Voorwarts* sudden change of course so startling, that the captain could not be fairly

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Watson.

expected to suppose, and did not believe the fact that a collision was imminent before he gave the order to stop and reverse, I should in that case have acquitted the *Khedive* of fault, on the ground that the 16th article could not reasonably be held to apply before the moment at which it was actually obeyed. But the captain's own testimony excludes that inference, because he distinctly avows that he at once saw the risk of the collision, but, instead of giving obedience to the rule, he steered so as to diminish the violence of the concussion which he anticipated.

The 16th article is expressed in terms absolute and unqualified; but it is rightly contended for the *Khedive* that it must be read in connection with the 19th article, which runs as follows: "In obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." This article undoubtedly introduces certain important qualifications of the rule enacted by article 16; but I do not think the case of the *Khedive* can be brought within either of the exceptions which it creates. There is nothing in the case to suggest the existence of any danger of navigation, a due regard to which would have led to a disregard of the 16th rule. The only existing danger was the very danger to which the rule applies, and to prevent which it was enacted. And there is just as little room for the suggestion that there existed any special circumstances which rendered it necessary for the *Khedive* to continue at full speed, instead of slowing, or stopping, or reversing, in order to avoid immediate danger.

I am accordingly of opinion that the *Khedive*, being within the rule of article 16, and not within any of the statutory exceptions to that rule, infringed it; and, seeing it has not been proved to my satisfaction that the circumstances of the case made a departure from the rule necessary, I consider myself bound by the provisions of the Act of 1873 (section 17) to hold that the *Khedive* was in fault.

It was not without hesitation that I ventured at first to differ from the opinions expressed by the learned Judges of the Court of Appeal. But fuller consideration of the case has satisfied me that

the principle upon which their Lordships decided in favour of the *Khedive* is inconsistent with the policy and provisions of the Merchant Shipping Acts. The principle, as I understand it, may be thus formulated:—When two vessels, A. and B., are approaching near to each other under steam, each steering a proper course, and A. is suddenly, by a wrong manœuvre placed in a position of critical danger, and exposed to the obvious risk of collision, A. shall not be deemed to be in fault by reason of her captain not having given the order to slacken speed or to stop and reverse, as required by the 16th Regulation, provided it is established to the satisfaction of the Court that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order.

I have possibly failed to give adequate expression to the principle which is so elaborately expounded in the opinion of the Lord Justice *Brett*, who in this case delivered the judgment of the Court of Appeal; but I think I am justified in stating that his Lordship did not decide in favour of the *Khedive* because she was not within the 16th Regulation, or because she was within any exception expressed in the statutes, but solely because he held it to be proved that departure from the rule, in the circumstances in which the captain of the *Khedive* was placed, did not imply such want of care and forethought as would constitute negligence or fault at common law on the part of a seaman of average skill and nerve. I cannot accept the principle thus affirmed by the Court of Appeal, because it practically substitutes for the statutory definition of fault the old rule of the common law, which, in my opinion, the statutory enactments were intended to supersede. The result of adopting the principle must be that whenever the risk of collision has been occasioned by the faulty manœuvre of one of two approaching vessels, the other vessel will be exempted from the statutory test of liability. Antecedent fault on the part of one of the colliding vessels must characterise a very considerable proportion of the cases of collision at sea; and I think it may be assumed that sudden and imminent risk of collision is frequently due to that cause. To abrogate the statutory rule in such cases would be tantamount to defeating the leading purpose of its enactment. It was enacted with a view to obviate the risk and

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Watson.

minimize the results of collision; and the more imminent the risk the more imperative is the necessity for implicit obedience to the rule. The argument was very fairly pressed upon us, that the Legislature cannot have intended to push the rule to such harsh extremities, as to hold that a vessel was in fault, whose captain had done all that could be expected of a seaman of ordinary nerve and skill. With that argument I cannot agree. It appears to me that it was the deliberate policy of the Legislature to compel sea-captains, when their vessels are in danger of collision, to obey the rule and not to trust to their own nerve and skill; and that it was an essential part of the same policy to admit of no excuse for non-observance of the rule short of satisfactory evidence, either that the captain was constrained to disobey it by other perils of the sea, or that he adopted a course which, in the circumstances, was better than that prescribed by the rule. And, for my own part, I cannot think the Legislature has acted unwisely in applying a uniform statutory test to all such cases, instead of leaving them to be decided by the variable test of *fault*, as ascertained in each case with the aid of nautical opinion.

The present question does not appear to be directly ruled by any previous decision of the Court of Appeal; and I therefore regret that the Lords Justices did not criticise, or even refer to, the provisions of the Merchant Shipping Acts; because it may be that the grounds upon which their Lordships set aside these enactments, as inapplicable to the case of the *Khedive*, have not been brought fully under the notice of the House. In the cases of *The Hibernia* (1) and *The Fanny M. Carvill* (2) the point did arise for decision before the Judicial Committee of the Privy Council; and it is very satisfactory to find that in both these cases, the view taken by the learned Lords of the policy and effect of the safety clauses of the Merchant Shipping Acts, was in complete accordance with the judgment proposed to be pronounced by your Lordships, in which I concur.

LORD HATHERLEY:—

My Lords, in this case I have requested both my noble and learned friends to read to your Lordships their written opinions,

(1) 2 Asp. Mar. Law Cas. 454, 422; on appeal, 2 Asp. Mar. Law Cas. 565.
(2) Ibid. 478; Law Rep. 4 A. & E.

which are so clearly expressed that they may be well understood by those who hereafter may have to take into their consideration the question of their duty when exposed to a possibility or danger of collision at sea.

My Lords, the case before us embraces two heads for consideration. The first is whether there has been any negligence, either by breach of rules or otherwise, on the part of the *Khedive*, the vessel sued by the owners of the *Voorwaarts*. The second question is whether the *Voorwaarts* itself was not guilty of violating the regulations of the Merchant Shipping Act, or whether at all events it did not contribute to the mischief. Now, my Lords, both the learned Judge of the Admiralty Court, assisted by nautical assessors, and the learned Judges of the Court of Appeal, also assisted by nautical assessors, were clearly of opinion that as regarded the *Voorwaarts* it was in fault in many particulars. I see no reason why their decisions should not be affirmed by your Lordships. I will not repeat what has been already stated in the opinions of my noble and learned friends, I only wish to express my entire concurrence in them.

As regards the *Voorwaarts* no other conclusion has been or could be arrived at than that there was considerable fault on the part of the officers of that vessel—[His Lordship referred to the evidence]—as to their leaving the deck, and the sudden porting the helm, and so changing the course as to bring that vessel into a position in which there was a probability of an immediate and direct collision with the *Khedive*. The *Voorwaarts* did not slacken speed, still less reverse the engines after the collision was seen to be imminent, until the very moment of its taking place. Therefore, my Lords, as to the *Voorwaarts* there can be no doubt or difficulty in the matter.

The question came to be what was to be said with reference to the position of the *Khedive*. I think the action was against the *Khedive in rem*, and the owners of that vessel put in a counterclaim with respect to the mischief done by the *Voorwaarts*. The Courts have decided that the *Voorwaarts* is responsible, whether solely or not, for what took place. Now with regard to the *Khedive* all seems to have proceeded perfectly smoothly, so far as I can observe from the evidence, until there was this sudden

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Hatherley.

change of direction on the part of the *Voorwaarts* by putting the helm hard-a-port, which brought the *Voorwaarts* and the *Khedive* nearer to each other at once, and ultimately brought about the collision. Upon that part of the case I confess I wished very carefully to read through the whole of the evidence. There is a great discrepancy between the testimony on the one side and on the other, greater than can possibly be reconciled, and that appears to be of the greatest importance. That subject has already been fully discussed, and I agree with my noble and learned friends who have preceded me that great weight is due to the opinions of the nautical assessors.

My Lords, the question being put to the nautical assessors, there was no difference of opinion in the Court below that the rules and regulations for preventing collisions between steam vessels at sea, especially article No. 16, had not been observed. That is the rule by which, when there is imminent danger, as there was in this case, of immediate collision, each person in charge of a ship is put under the responsibility of slackening speed, or, if necessary, stopping and reversing the engines. When we come to inquire what was done by the *Khedive* upon the extraordinary act I have described being done on the part of the *Voorwaarts*, we find that the captain of the *Khedive* (as my noble and learned friend has said) with great promptness and readiness, first of all starboarded the helm, and then finding a collision likely to take place if he went stem on to the other vessel, he gave the order to stand by the engines. The main question which comes before us is reduced to this, whether he should have gone beyond that and said or done either more or less at that time.

This question, my Lords, connected with what ought to have been the conduct of the captain of the *Khedive* on the occasion, has been referred as a special question to the nautical assessors by the Court of Appeal, and what the Lords Justices say is this, that although the nautical assessors said that to a certain extent what was proper had been done, yet they went on to say that the captain, at the same time that he gave the order to stand by the engines, ought to have ordered the stopping and the immediate reversal of the engines, so as to secure the *Khedive* from coming into immediate collision with the *Voorwaarts*. What he did

seems to have been done for the purpose of bringing the two vessels on parallel courses, so that if there were a collision at all between the vessels, it might have been by simple friction alongside instead of a direct collision, and have caused less damage in consequence.

But then the question is, should he or should he not have acted according to article No. 16, which lays down the course to be taken, and have stopped and reversed the engines, instead of going on at full speed? Now, my Lords, upon this there is a passage in the judgment of Lord Justice *Brett* which struck me during the argument, and has continued to strike me, as of considerable weight. It is this, "We are advised, and are of opinion, that under the circumstances and in the position of those two ships, it was quite right that the helm of the *Khedive* should be put hard a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard a-starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great danger of collision; it is obvious, therefore, that the rule of navigation applied, unless there were something which made it necessary for the safety of the navigation that the rule as to stopping and reversing should not be acted upon. Upon that, of course, we are bound to consult the gentlemen who advise us, and the question which we put to them was, 'Was it a right manœuvre, under the circumstances, on the part of the captain of the *Khedive* to order the engineers to stand by the engines, or was the right manœuvre then to order the engines at once to be stopped and reversed.' The answer was, as might have been expected, that the right manœuvre was not to order the engineer merely to stand by the engines, but the right manœuvre would have been to order the engines at once to be stopped and reversed. Therefore, at that moment the captain of the *Khedive* did not do what was absolutely the right thing. Moreover, if he did break the rule of navigation, by breaking that rule at that moment there is no doubt that he put the property and the liability of his owners into the greatest jeopardy." The question, as the learned Lord Justice said, was whether there was a necessity established for departing from the rule, and upon the answer

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Hatherley.

given by the nautical assessors the conclusion is that no such necessity was shewn. Has it ever been said by nautical assessors that what the rule prescribes was not the right thing to do? There appears to me to have been no excuse for a departure from the 16th rule.

The learned Judges of the Court of Appeal put it still more strongly in another part. Lord Justice *Brett* there says, "In such a position, if those on board the *Voorwaarts* had, from doing the wrong thing resolved in a moment to do the right thing, then it might be that the going a-head full speed of the *Khedive* would give them more room to get right again from what they were doing; but still we are advised, and are of opinion, that he did the wrong thing. But in answer to that last question, those advisers have advised us that the captain of the *Khedive* might be, as a seaman, fairly excused for that hesitation of a minute, and if so we are of opinion that, although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that short hesitation to do the best thing, he is not to be found guilty of a want of ordinary care and skill and nerve under the difficult circumstances in which he was placed." It appears to me, from reading that passage, that the learned Judge has somewhat extended the exceptions from the liability to be deemed in default. He adds to those exceptions which are specified this other exception: unless the captain can prove to the satisfaction of the Judges who have to determine the case that he acted as a resolute seaman with good nerve, and so on. Now I apprehend, my Lords, that really the concluding observations which were made by my noble and learned friend who last preceded me (Lord *Watson*), citing the case of *The Hibernia* (1) and the case of *The Fanny M. Carvill* (2), dispose exactly of this view, which appears to have been taken by the learned Lord Justice. If you can shew that you could not adhere to the rule without producing danger, that is one of the specified exceptions. If you can shew that there was an absolute necessity for doing what you did or what you omitted to do, then again you are exempted. And it is thus left open to you to shew that you did not contribute to the mischief.

(1) 2 Asp. Mar. Law Cas. 454.

(2) 2 Asp. Mar. Law Cas. 478; Law Rep. 4 A. & E. 422; on appeal, 2 Asp. Mar. Law Cas. 565.

Perhaps it is not astonishing that some little degree of confusion should arise from the numerous dealings with these Acts of Parliament and the various changes in their wording. But in a case of immediate danger, where a collision appears to be inevitable and all depends upon the course of action immediately pursued, nothing can be more important than that those who have charge of the navigation of a vessel should know that if they depart from the rule which is laid down with sufficient distinctness, they must prove not only to their own satisfaction, but also to the satisfaction of the Court which has to decide the question, that what was done was necessary for the purpose of avoiding immediate danger. Now, one remark occurs here, which is this, that these rules must be looked at very much from this point of view; they are general rules to be adopted by all persons having charge of the navigation of vessels with the exceptions which have been pointed out. This rule is not laid down merely for the sake of the vessel commanded by the man who breaks it, but for the sake of the vessel commanded by the man approaching at a distance and who has no right or reason to suppose that he will break it. If the rule is observed, every person will know precisely what he is to do, and will say, I will carry out my directions entirely with that knowledge which I possess. On the other hand, if the Court allows these rules lightly to be departed from, the result will be the very evil which the Act was intended to prevent. As I have just said, these are general rules, laid down to govern any person who has charge of a vessel, both for the sake of the safety of his own vessel and for the sake of the safety of the vessels approaching him. A strong instance of the importance of observing them occurs in this very case. If the rule had been acted upon, from the steady course which the two vessels were holding, it would in all probability have led to a successful issue, but the disregard of the rule with reference to the porting of the helm caused the one vessel to steer on to the other, and that very danger was produced which the rule was intended to prevent.

Therefore, my Lords, I think that the regulations having been departed from by the *Khedive*, that vessel must be deemed to be in fault, unless the master produces a statutory exculpation and proves it to the satisfaction of the Court. That does not appear

H. L. (E.) 1880

STOOMVAART MAATSCHAPPY NEDERLAND v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Lord Hatherley.

to have been done in this instance. It follows that the course we must take will be to restore the judgment of the Court of Admiralty and to reverse that portion of the decree of the Court of Appeal which exempts the *Khedive* from liability. The motion which I should suggest to your Lordships, if you see fit to accede to it, would be, that the decree of the Lords Justices be reversed so far as it exempted the *Khedive* from liability and so far as it relates to paying the costs of the proceedings below; and that the order of the Court of Admiralty be restored.

[*After consulting with Lord Blackburn his Lordship added*:—] My Lords, the motion I have to make is this: To reverse the order of the Court of Appeal so far as it alters or varies the decree of the Court of Admiralty; to restore the judgment of the Court of Admiralty, and to give the costs of the appeal in this House to the successful party, the Appellants.

Decree of the Court below complained of reversed so far as it varies the decree of the Court of Admiralty, and the judgment of the Court of Admiralty restored: the Appellants to have their costs of the appeal to this House.

Lords' Journals, 23rd July, 1880.

Solicitors for the Appellants: *Clarkson, Son, & Greenwell.*
Solicitors for the Respondents: *Freshfields & Williams.*

[HOUSE OF LORDS.]

THE DIRECTORS, &c., OF THE LONDON GUARANTIE COMPANY . . . . } APPELLANTS;

AND

BENJAMIN LISTER FEARNLEY . . RESPONDENT.

H. L. (I.)
1880
July 13, 27.

Condition Precedent.

F. who was about to employ *M.* in a situation of trust and confidence, effected a policy with a Guarantie Company to secure himself against fraud by embezzlement of money by *M.* The policy, which was for £1000, declared that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the company undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give notice of the claim, and proofs were to be given such as the directors for the time being might require. Then followed this proviso: "Provided that the employer shall if, and when, required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement, by the employed, or by his estate, of any moneys which the company shall have become liable to pay." *F.* claimed under this policy a sum of money alleged to have been lost by *M.*'s embezzlement. The directors pleaded that they had required *F.* to prosecute *M.*, but that *F.* had not done so. Demurrer, because it did not appear that there was any obligation for *F.* to prosecute *M.*, or that the non-performance of any such obligation, was a condition precedent to *F.*'s right to recover.

Held, reversing the judgment of the Court below (THE LORD CHANCELLOR (Lord *Selborne*) *diss.*), that the proviso did constitute a condition precedent, and furnished a defence to the action.

THIS was an appeal against a decision of the Court of Appeal in *Ireland*, made on the 25th of November, 1879, by which a previous decision of the Court of Exchequer there (the Judges in the Court of Appeal being equally divided), was allowed to stand affirmed.

The action was brought to recover a sum of £1000 upon a

H. L. (I.) 1880 — LONDON GUARANTIE COMPANY v. FEARNLEY.

guarantie policy given by the Appellants, dated 8th of March, 1875, by which the Plaintiff (the present Respondent) was to be indemnified against any fraud or dishonesty (which should amount to embezzlement of money), which should be committed by one *Frederick Marshall*, then about to be employed by the Plaintiff as manager of a tavern in *Duke Street, Dublin*. The policy was for one year, and one of the articles declared that, subject to the provisions in the memorandum of association, "and subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the said employer to recover under this policy, during the year from the date hereof, and during any year thereafter in respect of which the company shall consent to accept, and the employer shall pay, on the day of the date hereof, the aforesaid premium, the company shall at the expiration of three months next, after proof satisfactory to the directors of the loss herein mentioned has been given to the company, make good and reimburse to the employer to the extent of the sum designated in the margin hereof as the amount guaranteed, and no farther, such pecuniary loss sustained by the employer by reason of any fraud or dishonesty of the employed in connection with the duties hereinbefore referred to, as shall amount to embezzlement of money, and be committed and discovered during the continuance of the policy, and within three months from the death, dismissal, or retirement of the employed." Among other provisions in the policy was the following:—

"Provided that, on the discovery of the default or defalcation, the employer shall immediately give notice thereof to the company, and any claim made in respect of this policy shall be in writing, addressed to the company's chief office in *London*, within three months after such discovery; and the company shall be entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness of such claim, and of the correctness of the statements made at the time of effecting, or desired to be made at any renewal of the policy, as the directors for the time being may require, and to have the same or any of them verified by statutory declaration." And no more claims than one, and that only in respect of acts or defaults committed within twelve months from the date of the receipt of the notice, were to be made: "and

the policy was stated to be granted on condition that the business of the employer should continue to be conducted, and the duties and the remuneration of the employed were to remain in every particular with the statements before referred to;" and if, during the continuance of the policy, any circumstance should occur, or charge be made, which shall have the effect of making the actual facts differ from the statements "previously made, without notice being given to the company, and the consent of the company being obtained thereto, or any suppression or misstatement should be made," the policy was to be void. Then came this provision: "Provided that the employer shall, if and when required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and in consequence of which a claim shall have been made under the policy; and shall, at the company's expense, give all information and assistance, to enable the company to sue for and obtain the reimbursement by the employed, or by his estate, of any moneys which the company shall have become liable to pay."

An action was brought on this policy. Many defences were pleaded, but the seventh plea became the only one material to be considered. That plea was in the following form: "That though the Plaintiff was required so to do by the Defendants, yet he did not use diligence in prosecuting the said *Frederick Marshall* for the said fraud or dishonesty, which the Plaintiff alleges he the said *Frederick Marshall* was so guilty of, as in the plaint stated, nor had the said Plaintiff the said *Frederick Marshall* brought to trial." The Plaintiff demurred to this seventh defence on the ground that it did not "disclose any grounds of defence good in substance, and therefore the Plaintiff demurs in law to the said defence, because it is not alleged therein, nor does it appear therefrom, that there was any obligation on the Plaintiff to prosecute the said *Frederick Marshall* and bring him to trial for embezzlement, or that the non-performance of any such obligation was a condition precedent to the Plaintiff's right of action."

The Court of Exchequer allowed the demurrer. On appeal the

H. L. (I.) 1880

LONDON GUARANTIE COMPANY v. FEARNLEY.

Judges were equally divided, and the judgment of the Court below stood affirmed (1). This appeal was then brought.

Mr. *Webster*, Q.C., and Mr. *J. C. Mathew* (Mr. *D. Fitzgerald*, of the Irish Bar, was with them), for the Appellants :—

The words of the contract declared that the conditions therein mentioned were to be conditions precedent—and in their very nature it was evident that they must be so. The facts in *Bettini* v. *Gye* (2), relied on in the Court below, were not the same as here, for in that case there was no express stipulation that the stipulations in the contract should be conditions precedent, and the Court thought that the conditions themselves did not go to the root of the matter; but all the reasoning in that case was clearly in favour of the Appellants here. As to the facts, there was here a distinct declaration that the stipulations in the contract should be conditions precedent. The intention of both parties was therefore clear. And there could be no doubt that this particular stipulation did go to the root of the matter, and was therefore in its very nature a condition precedent: *Boone* v. *Eyre* (3); *Poussard* v. *Spiers* (4); *Cooper* v. *The London and Brighton Railway Company* (5). Even the communication of the name of a vessel in which goods had been shipped: *Graves* v. *Legg* (6); or the port where a ship is lying at the time of effecting a policy: *Behn* v. *Burness* (7); or the description given of an article sold, *Bowes* v. *Shand* (8), may amount to a condition precedent, though not so specifically described. What is or is not a condition precedent depends not on mere technical words, but on the plain intention of the parties: *Porter* v. *Shephard* (9); *Worsley* v. *Wood* (10); *Roberts* v. *Brett* (11). As to that intention in this case there could here be no doubt, for it was distinctly expressed, and the stipulation in question was one of a most material kind.

It was of no importance that the condition was in the form of a

(1) Ir. Law Rep. 6 Q. B. Div. 219.
(2) 1 Q. B. Div. 183.
(3) 1 H. Bl. 273, n.
(4) 1 Q. B. Div. 410.
(5) 4 Ex. Div. 88.
(6) 9 Ex. 709.
(7) 3 Best & S. 751.
(8) 2 App. Cas. 455.
(9) 6 T. R. 665.
(10) Ib. 710.
(11) 11 H. L. C. 337.

proviso, for a proviso might amount to a condition: *Co. Litt.* (1); *Pordage* v. *Cole* (2); *Cutter* v. *Powell* (3).

The *Attorney-General for Ireland* (Mr. *Law*), and Mr. *McBlaine* (of the Irish Bar), for the Respondent:—

The seventh plea here does not sufficiently disclose a defence to the action. It shews no obligation on the part of the Plaintiff to prosecute *Marshall* and bring him to trial before claiming payment under the guarantie, it merely alleges that he was required to prosecute but did not do so. The demurrer to it was therefore properly allowed. It does not matter that the parties have called certain stipulations by the name of conditions precedent. If they are not of that character they will not be enforced as such. Here they are not of that character. Some of them could not possibly be acted on till after the right to recover on the guarantie had come into force, and the title to maintain the action was complete. The stipulations in this case are of various characters, they constitute independent covenants not conditions precedent, and being so, they may form the ground for a cross-action but cannot be made a defence to this action itself: *Stavers* v. *Curling* (4); *Phillips* v. *Foxall* (5); *Sanderson* v. *Aston* (6). There are various stipulations here of different degrees of importance, some of which could not possibly be conditions precedent, and there is nothing to give this one that particular character. It is a mere undertaking to do a particular act, one of a whole series of acts, but it cannot be treated as a condition precedent, the non-performance of which is to bar the right of action, for that would be to give it the character of a penalty, which it does not possess: *Kemble* v. *Farren* (7).

Mr. *Webster* in reply.

LORD BLACKBURN:—

My Lords, it has long been the practice of companies insuring against fire, for the purpose of their own security, to incorporate

(1) 1 Co. Lit. 203, n. 1.
(2) 1 Wm. Saund. 319, and n.
(3) 2 Sm. L. C. 4th Ed. 1.
(4) 3 Bing. N. C. 355.
(5) Law Rep. 7 Q. B. 666.
(6) Law Rep. 8 Ex. 73.
(7) 6 Bing. 141.

H. L. (I.) 1880 — LONDON GUARANTIE COMPANY v. FEARNLEY. — Lord Blackburn.

in their policies, by reference to their proposals, various stipulations for matters to be done by the assured making a claim before the company is to pay them, and (as the remedy by action for not complying with these stipulations would not afford them any protection) to make the fulfilment of those conditions a condition precedent to their obligation to pay. There was much controversy on the subject about a century ago; but since the case of *Worsley* v. *Wood* (1) it has been settled law that this mode of protecting themselves is effectual.

Those who prepared the policy for the company in the present case wished to do the same, but have not been happy in the words they have chosen for the purpose. So far as any of their stipulations, or, as the policy calls them, "conditions," are for something to be done preliminary to the completion of the proof, satisfactory (that is, which ought to be satisfactory) to the directors, from which completion of proof the time of the payment is to run, I think it is not disputed that they have effected their object. But such stipulations as relate to things to be done after payment is due are not, and cannot be, conditions precedent. The provision in question as to the employer, when required, using all diligence in prosecuting the employed to conviction is coupled with a stipulation that he shall give all assistance to enable the company to obtain reimbursement from the employed or his estate is different; that latter stipulation is not and cannot be a condition precedent to the obligation of the company to pay: the company cannot be entitled to reimbursement till it has, at least, become liable to pay. It seems to me unlikely that those who framed the policy stipulated for the prosecution by the employer, with a view to facilitate reimbursement, and I do not think the words such as to require us to put this construction on the instrument, a construction which seems to me unreasonable. I think that the two matters are separate and independent, and that the meaning of the first part of the stipulation is that the employer, who is not entitled to recover except for loss by embezzlement, shall, if required, subject his proof to the test of bringing it before a magistrate, and so subjecting it to the defence of the person accused of embezzlement, before the directors are called on to say whether the proof is

(1) 6 T. R. 710.

satisfactory. The stipulation thus understood is one not at all unreasonable, and is one the nature of which makes it necessary, for the protection of the company, that it should be made a condition precedent to an action for damages, for not doing this would give the company no redress.

It seems to me, therefore, that the whole question is reduced to that of the construction of an ill-penned instrument: a matter on which opinions always may differ, and in this case have differed. I do not think that the rules which are laid down as to the construction of agreements in which there are cross contracts, in order to see whether those cross contracts are dependent or independent, are of much assistance, where, as here, the question is, whether a matter is expressly made a condition precedent, nor that much good can be done by arguing on the words used, or citing cases: it would be merely repeating what has been said below. All agree that the question is, what is the intention to be collected from the words. I agree that the intention is obscurely expressed; and that the obscurity is the fault of the language used by the company, which can be amended in future by so framing the policy as to leave no doubt as to its meaning; and this is, I think, the strongest argument against putting on the instrument the construction which I do. But, after making all due allowance for this, I am obliged to come to the conclusion that the intention must have been what I have last stated, and that it is sufficiently expressed to have the effect of making this a condition precedent. I need not say that, knowing that the Lord Chancellor takes a different view, I express my opinion with diffidence. I think that the decision below should be reversed with costs, and I beg to move accordingly.

LORD WATSON:—

My Lords, the parties to this appeal in the year 1875 entered into a contract of insurance by which the company, in consideration of certain premiums paid, and to be paid, and subject to the conditions therein expressed, agreed to make good to the extent of £1000 the pecuniary loss sustained by the insured, by reason of such fraud or dishonesty on the part of his servant, one *Marshall*, as should amount to embezzlement of money. It was expressly

H. L. (I.) 1880 LONDON GUARANTIE COMPANY v. FEARNLEY. Lord Watson.

declared that the conditions therein declared should be conditions precedent to the right of the insured to recover under the policy.

By the third proviso contained in the policy it is conditioned as follows: "Provided that the employer shall, if and when required by the company (but at the expense of the company if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or by his estate of any moneys which the company shall have become liable to pay."

A claim having been made under the policy, the directors before admitting or denying liability, required the insured to prosecute the employed criminally. With that requisition the insured did not comply; and the only question presented in this appeal for the decision of the House is—whether the stipulation, which the insured thus failed to implement, was or was not a condition precedent to his right to recover the amount of his loss from the company.

It cannot, with any propriety, be said that the stipulation in question goes to the root of the contract between these parties. Nevertheless, it may be a condition precedent, provided it appears that the parties intended it should have that effect. In the words used by the noble Lord (*Blackburn*) in his judgment in the Queen's Bench in the case of *Bettini* v. *Gye* (1), "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one." That an insuring company can claim the protection of the rule thus expressed is settled by the case of *Worsley* v. *Wood* (2).

The effect of the general declaration that all the conditions of the policy shall be conditions precedent appears to me to be precisely the same as if a similar declaration had been repeated at the commencement of each proviso, and of each separate condition embodied in such proviso. I therefore take the case on the same

(1) 1 Q. B. Div. 183, at p. 187. (2) 6 T. R. 710.

footing as if the parties had stipulated in these terms with regard to proviso 3: "That it shall be a condition precedent to the right of the employers to recover, that they shall, if and when required by the company, use all diligence in prosecuting the employed to conviction," &c., &c.

When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a Court of Law ought not to enforce it, or to be *suâ natura* incapable of being made a condition precedent.

In the present case I am of opinion that, having regard to the character of the risk insured against, it would not be an unreasonable thing for the company to stipulate that, before admitting or being subjected to liability for the sum insured, the employers should, as a condition precedent to their right of recovery, use, if and when required, all possible diligence to prosecute the fraudulent person to conviction. But it is contended for Mr. *Fearnley*, the Respondent, that, according to its sound construction, the stipulation which the parties have made in regard to a criminal prosecution of the employed cannot become a condition precedent to his right to recover, even by virtue of an express declaration to that effect. And that contention is undoubtedly well-founded, if in the case of the insured's obligation to prosecute criminally, as in the case of his obligation to give information and aid in civil proceedings, the time of performance be, from the nature of the obligation, necessarily postponed until the directors of the company have admitted liability and paid the money.

It appears to me that the stipulations with respect to proceedings criminal and civil contained in the third proviso of the policy, constitute two distinct and separate obligations. They are so independent of each other that the company may require the performance of one of them only, and the insured, if required to perform both, might implement the one and leave the other unfulfilled.

The words of the proviso do not fix any limit of time within which the obligation of the insured to institute a criminal prosecution must be performed; but it does not necessarily follow that

H. L. (I.) 1880 LONDON GUARANTIE COMPANY v. FEARNLEY. Lord Watson.

the obligation must be treated as if its performance were referable to a period subsequent to the company's admission of liability. Although the proviso does not absolutely fix the time of performance, it provides that the insured shall proceed whenever required by the company, so that the contract of the parties leaves it entirely to the company to determine at what time criminal proceedings shall be initiated. Now, it appears to me that when that which is left indeterminate in a contract, whether it be time, or place, or *quantum*, becomes fixed and ascertained in the manner stipulated by the contracting parties, it must be treated just as if it had been an original term of the contract. And seeing that the directors, before admitting liability, did, in the exercise of their undoubted right, require the insured to fulfil the condition of the policy with respect to criminal prosecution, I am of opinion that it must be regarded as a condition precedent.

I have only this observation to add, that when, as in the present case, the parties to a contract make a stipulation in which nothing is expressed as to time, and which might, according to its own terms, be fulfilled either within or after the period during which it could operate as a condition precedent, and the parties then go on to declare that it shall be a condition precedent, I think the declaration must, *primâ facie*, be held to be a sufficient expression of their intention to limit the time of performance to the antecedent period.

On these grounds I have, after much hesitation, formed an opinion that the judgments under appeal, in so far as these allow the demurrer to the Appellant's seventh defence, ought to be reversed and the demurrer overruled.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, I have the misfortune to differ in this case from the opinions of my noble and learned friends.

It is admitted, and it is undeniable, that some of the provisoes contained in the policy in this case are of a nature which makes it impossible that they should be conditions precedent to the liability of the company to pay the amount guaranteed, in the event of such a loss as is contemplated by the policy. The express declaration, therefore, that the policy is granted "subject to the

conditions herein contained, which shall be conditions precedent to the right on the part of the said employer to recover under this policy," can have no greater effect than this, that such of the subsequent provisoes as, according to their true intent and meaning (to be collected in the usual manner upon a sound construction of the whole instrument), may be restricted to things to be done on the part of the employer before any right of action accrues to him under the policy, are to be conditions precedent of the right to recover.

Now the contract of the company is, that subject to such conditions precedent, they will, "at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and reimburse to the employer" (to the extent of £1000) "such pecuniary loss sustained by the employer by reason of any fraud or dishonesty of the employed in connection with the duties before referred to, as shall amount to embezzlement of money, and be committed and discovered" within the time therein limited.

One test of the question to be now determined appears to me to be, whether the "proof satisfactory to the directors," within three months after which the liability of the company is to become absolute, does or does not include that sifting of evidence, which might take place by means of criminal proceedings against the person charged with embezzlement, in a case in which the company may require a prosecution? It might perhaps have been quite reasonable if it had been so; though, if proofs which (in the opinion of a Court of Justice) ought to be regarded as satisfactory had been already furnished to the directors, it would by no means necessarily follow that the claim against the company would fail, because a prosecution might not succeed. But an intention that the directors should be at liberty to insist upon a criminal charge, prosecuted to conviction or acquittal, as part of the "satisfactory proof" which they are entitled to require is, at all events, not expressly declared; and the position and context of the proviso as to prosecution, and the terms and effect of the provisoes which precede it, do not appear to me to favour the view that it was, in fact, introduced with that intention.

The whole subject of the "proof" to be given to the company

H. L. (I.)
1880
LONDON GUARANTIE COMPANY v. FEARNLEY.
Lord Selborne, L.C.

is dealt with by one of those earlier provisoes, which is certainly a condition precedent of the company's liability.

Notice of the discovery of any fraud or defalcation insured against is to be given to the directors; who are to be "entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness" of the claim, "as the directors for the time being may require, and to have the same, or any of them, verified by affidavit." If, for the more complete establishment of such proofs, it had been intended to stipulate that they should be verified or sifted by proceedings in a criminal trial this would have been the natural place to say so. But the subject of proof is not here any farther pursued. Other conditions precedent, unconnected with that subject, are interposed before we come to the proviso as to prosecution.

That proviso consists of a single sentence, divisible into two clauses, both of which are governed, grammatically, by the same introductory words: "Provided that the employers (1) shall, if and when required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and in consequence of which a claim shall have been made under this policy; and (2) shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed, or by his estate, of any moneys which the company have become liable to pay." The second of these claims cannot be a condition precedent of the company's liability, because it can only come into operation after the liability has become absolute. This being so, it would, I think, be a somewhat forced and violent construction to treat the former clause of the same sentence as a separate proviso, and as a condition precedent, when the latter clearly is not. That clause, according to the natural import of its words, gives the directors a right, at any reasonable time, either before or after acceptance of the proofs offered by the employer, and either before or after payment of the claim, to require the employer to prosecute. If it were a condition precedent, it must necessarily be restrained to the period before the proofs have been accepted as satisfactory, or at the

latest to three months after that period, which might not give sufficient time for a criminal trial. One of your Lordships, if I understand rightly, appears to think that it may be held to operate as a condition precedent when the employer is required to prosecute before the acceptance of the proofs as satisfactory, or before the lapse of the three months: and that it may also entitle the directors to require a prosecution at a later period, when it cannot so operate. I must own that this is not in accordance with what I have hitherto understood to be the law. I have always understood that a condition cannot be construed to be precedent unless it is so necessarily, and under all the circumstances to which it can apply.

If the first clause is read in its natural connection with the second, both seem to be relative and subsidiary to one object, viz., the reimbursement to the company of so much of the amount for which the company is liable, as the defaulter may have property to satisfy. That may not be a very hopeful matter, but it is evidently one for which the directors thought it worth while, and intended, to take security by this proviso, which is immediately followed by another proviso for a somewhat similar object, viz., that of securing to the company the benefit of any other guaranties or securities for the defaulter which the employer might hold. The prosecution of the defaulter to conviction might, under clauses 4, 14, and 15, of the *Forfeiture for Treason and Felony Act*, 1870, facilitate the recovery of all or part of the loss from his property or estate if he had any; and another reason for enabling the directors to insist (with the same object in view) on a prosecution may have been that, according to an opinion which (whether well-founded or not) has been widely prevalent, a voluntary neglect to prosecute might have been supposed to be an impediment to a civil remedy against the defaulter or his estate.

I am of opinion that this proviso ought, upon the proper construction of the whole policy, to be deemed to have been inserted for these, and only for these, purposes, and not as a condition precedent, and therefore I think that the judgment under appeal is right. But as both my noble and learned friends who have preceded me are of a different opinion, their opinion must of course prevail.

H. L. (I.)
1880
LONDON GUARANTIE COMPANY v. FEARNLEY.
Lord Selborne, L.C.

I understand, my Lords, that costs must be mentioned. Although I have the misfortune to differ in opinion from my two noble and learned friends, yet looking to the circumstances and the nature of the case, I am by no means of opinion that any exception should be made in this case to the general rule that the costs should follow the event.

Judgment of the Court of Appeal in Ireland reversed in so far as it affirms so much of the order of the Court of Exchequer in Ireland of the 6th June, 1877, *as allows the demurrer to the seventh defence: Declared that the demurrer to the seventh defence ought to have been, and is, overruled. Respondent to pay the costs in this House and in the Court below.*

Lords' Journals, 27th July, 1880.

Solicitors for the Appellants: *Holmes, Anton, & Greig.*
Solicitor for the Respondent: *W. Bell.*

[HOUSE OF LORDS.]

BROWNLIE . . . . . APPELLANT;
CAMPBELL AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)
1880
June 10.

Scotch Conveyance—Sales of Heritable Estate—General Clause of Warrandice—Collateral Representation—Concealment.

Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. *A.* agrees by missives attached to the articles of roup to buy the estate, and a conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement: "The lands hold of the Crown," and in answer to an inquiry made before the sale on behalf of *A.* as to the nature of the holding, the sellers' agents referred *A.* to the note of particulars, adding: "The proprietors" (*B. & C.*) "are not entered with the Crown, but you are aware the Crown never asks for an entry." The foundation for the belief that the lands were held direct of the Crown rested on a decree of tinsel, dated 1813, directed against the heir of line of the last superior, and a decree of forfeiture of the mid-superiority, dated 1849, followed by a Crown charter. From 1813 there had been no assertion of a contrary right.

Immediately before the sale the agents for *D.*, the disponee of the last superior, wrote to *B. & C.'s* agents claiming the right of mid-superiority, but this claim on its being disputed and not further persevered with, *B. & C.'s* agents did not intimate to *A.* Two years later *D.'s* agents renewed the claim, and ultimately raised an action against *A.*, claiming a year's rent as composition on his entry. *A.* was found liable, and the decree of forfeiture was reduced.

A. thereupon raised this action against *B. & C.* for repetition of the sum paid, the expenses of the litigation, and a sum equal to one and a half times the casualty of composition, on the ground, (1), of warrandice, and, (2), misrepresentation and concealment on the part of *B.'s* agents:—

Held, affirming the decision of the Court below, that there had been no breach of warrandice; and that the representation was perfectly true according to the knowledge and belief of those who made it, and, that being so, any error therein was covered by the express contract of the purchaser to take the property with the risks of errors in the particulars.

APPEAL from a judgment of the First Division of the Court of Session, *Scotland*.

By missives dated February and March, 1874, and minute annexed to certain articles of roup, under which the lands had

H. L. (Sc.)
1880
BROWNLIE
v.
CAMPBELL.

been exposed for sale, the marriage contract trustees of Mrs. *Macalister* and Mrs. *Wallnutt*, the Respondents, agreed to sell to Mr. *A. Brownlie*, the Appellant, the estate of *Monkcastle*, which they had inherited from their father, *William Campbell Miller*, for the sum of £26,500.

The sale was completed by disposition executed in October, 1874, and feudalised in the person of the Appellant by being recorded in the general register of sasines 11th of November of the same year. By this disposition the Respondents conveyed "All and whole the lands of *Monkcastle*, &c., and together with all right, title, and interest belonging or that shall belong to us the granters hereof or consenters hereto, or any of us . . . to holden the said lands . . . and others, *a me vel de me*." The disposition proceeds: "And we, with consent aforesaid, assign the writs, and have delivered the writs Nos. 1 to 5 inclusive, 8 and 26 to 29 inclusive, 31 to 38 inclusive, and No. 41 of the inventory annexed . . . bind ourselves to make the remaining writs for coming to our said disponees on all necessary occasions." Then came this clause: "And we with consents foresaid bind ourselves . . . to free and relieve the said disponee of all feu duties, casualties, and public and parish burdens." And the warrandice clause was in the usual terms: "And we with consents foresaid grant warrandice from all facts and deeds done or to be done by us, and with consents foresaid bind the beneficiaries under said contract of marriage, and their heirs, successors, and representatives whomsoever in absolute warrandice."

The note of particulars of sale contained this sentence: "The lands hold of the Crown;" and on an inquiry as to how the lands were held the sellers' agents in writing on the 6th of January, 1874, referred the Appellant to the note of particulars for the information he required, adding: "The proprietors are not entered with the Crown, but you are aware the Crown never asks for an entry." The articles of roup contained a clause to the effect that the purchaser shall be held to have satisfied himself before the sale as to the validity and sufficiency of the title-deeds and the exposers' power of sale, and as to the rental, value, and extent of the lands; and the amount of the feu duties, and public and parochial and other burdens affecting the same; and shall not be

entitled to require any further title to be made up at the expense of the sellers, nor require them to enter with the superiors; nor to demand any deduction from the price on account of any misunderstanding, error, or defect in regard to the above matter, or on account of any alleged error or inaccuracy in any plans or particulars of the said lands. They also sent him the searches for incumbrances at his request.

The foundation for the belief that the lands were held direct from the Crown was founded on the following: *Douglas* Duke of *Hamilton*, stood infeft at his death in 1799 in the mid-superiority of the lands. He died without issue. His heir of line was Lord *Stanley* afterwards the Earl of *Derby*. He seems to have declined to make up titles to the superiority; and *Alexander Miller*, who held a precept of *clare constat* dated 1780, after charging him to enter, obtained in 1813 a decree of declarator of tinsel of the superiority under the old Statute of 1474, c. 57, and in 1849 he obtained a decree of forfeiture of the superiority against the Earl of *Derby*, under the Act of 10 & 11 Vict. c. 48, s. 8, which was followed by a Crown charter dated 1850. These were contained in the progress of title-deeds in favour of the sellers, and it was understood that the mid-superiority had been permanently extinguished.

But in 1873, the agent for the marriage trustees of Lord and Lady *Rossmore*—the lady being a natural daughter of the Duke *Douglas*—intimated to the Respondents' agents *M'Ewen* and *Carment*, that they claimed the mid-superiority as having been left to Lady *Rossmore* by the *mortis causâ* deed of the Duke *Douglas*; that Lady *Rossmore's* marriage trustees had made up a title to it; that the lands were in non-entry, and that they required the parties who had advertised the lands for sale to take an entry. The Respondents' agents replied that the mid-superiority had been extinguished by the decree of tinsel and forfeiture above-mentioned. The agents for the *Rossmore* trustees then wrote that they would like to know how the Respondents proposed to settle the value of the superiority due to the *Rossmore* trustees under sect. 13 of 10 & 11 Vict. c. 48, continued by sect. 109 of 31 & 32 Vict. c. 101. The sellers' agents replied that the Acts did not apply to this case, and that even if they did the expenses would be

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL.

greater than the value of the superiority. The *Rossmore* trustees in return wrote doubting this and desired to see the decree of forfeiture and all the prior charters, but after some further correspondence this was declined by letter dated the 29th of November, 1873, on the grounds that the Respondents' agents required them themselves for an intending purchaser, and also on the ground that the proprietors could not be expected to exhibit their titles when the object was to make a claim against them which they were advised was not well-founded and which they were prepared to resist.

The Respondents' agents, *M'Ewen* and *Carment*, did not communicate to Mr. *Brownlie* the objection which had thus been intimated to the right of their clients to hold the lands direct of the Crown, but proceeded with the sale. The *Rossmore* trustees on their part, allowed the matter to drop, and took no further steps until August, 1875, when their agents wrote to Mr. *Browlie*, intimating that they claimed the right of mid-superiority; that the lands were in non-entry; that they were advised that the decree of forfeiture of 1849 was ineffective as directed against the wrong parties; and requested the titles to be sent to them that they might fix the amount of the composition payable in consequence of the death of the last vassal. Mr. *Brownlie* refused to pay any composition, and the result was that the *Rossmore* trustees, in 1876, raised an action against Mr. *Brownlie* and the sellers for reduction of the decree and forfeiture of the superiority, and for declarator that a casualty—a full year's rent of the lands—became due to them as superiors on the infeftment of Mr. *Brownlie* on the 11th of November, 1874. Mr. *Brownlie* defended the action in his own name after intimating to the sellers that he reserved his right to relief. The Court of Session decerned against him in terms of the conclusions of the summons, and he was compelled to pay the sum of £480 as the casualty due, and the decree of 1849 and Crown charter following upon it were reduced.

Thereupon Mr. *Brownlie* raised this action against the Respondents to recover from them the amount of the casualty which he was obliged to pay, of his expenses in the above-mentioned litigation, and the value of the superiority taken at one and a half times the casualty of composition. He rested his case (*a*) on the war-

randice in the disposition by the Respondents in his favour; and (*b*) the alleged misrepresentation made by their agents that the lands were held of the Crown, and their fraudulent concealment of the intimation made to them by the claim of the *Rossmore* trustees to the mid-superiority. His pleas in law were, *inter alia*:

(2.) The Defenders having sold to the Pursuer the *plenum dominium* of an estate held immediately of the Crown, and the said estate having been divided, and the estate of superiority thereof having been evicted from the Pursuer, the Defenders are, in the circumstances, and in respect of the warrandice granted by them to the Pursuer, bound to make good to him the loss thereby occasioned, and to relieve him of the expenses of maintaining the defence of his right to the said estate.

(3.) The Defenders having, at the time of the sale of *Monkcastle*, been made aware that the *dominium directum*, or estate of superiority held immediately of and under the Crown, was claimed by third parties, and having, in that knowledge, made the said representations and bound themselves by the said clause of warrandice, without notice to the Pursuer that such claim had been made, thereby warranted the title to be a good Crown title, and are now liable to the Pursuer as concluded for.

(4.) The Defenders having at the time of the sale by them to the Pursuer been made aware that the said estate of superiority belonged to, or at least was claimed by, third parties, and having fraudulently and wrongfully concealed the existence of said fact from the Pursuer, and, *separatim*, having fraudulently, or at least recklessly and wrongfully, and in the knowledge of said claim, represented to him that the said lands were held of the Crown, they are liable in reparation to him as concluded for.

The Respondents, *inter alia*, denied any misrepresentation, and in the proof allowed before answer their agents, Messrs. *M'Ewen* and *Carment*, stated that they believed the decree of forfeiture to be a good answer to the claim that had been intimated to them, and that the acquiescence of the claimants when their demand was refused confirmed them in that belief.

The Respondents further offered that if the Pursuer "considered that he is aggrieved by what has taken place, the Defenders are willing, under reservation of their whole defences and pleas, to relieve the Pursuer of his purchase of the lands of *Monkcastle*."

Their pleas in law were:

(1.) The averments of the Pursuer are not relevant or sufficient to support the conclusions of the summons.

(2.) None of the subjects contained in the disposition by the Defenders in the Pursuer's favour having been evicted from him, there has been no breach of the warrandice therein contained, and the Defenders are entitled to absolvitor.

H. L. (Sc.)
1880
BROWNLIE
v.
CAMPBELL.

(3.) The Pursuer having, in terms of the articles of roup, satisfied himself as to the validity and sufficiency of the title-deeds, the present action is untenable.

The Lord Ordinary (1) on the 27th of February, 1878, pronounced an interlocutor sustaining the first plea in law for the Defender, and assoilzied them from the conclusions of the summons. The Appellant reclaimed to the First Division, and their Lordships, after hearing counsel, recalled the Lord Ordinary's interlocutor, and allowed the Appellant before answer a proof of his averments, and the Respondents a conjunct probation.

Accordingly proof was led before Lord *Deas*, and on the 16th of July, 1878, the Lords of the First Division pronounced this interlocutor: "Having resumed consideration of the cause, with the proof for the parties, title-deeds, and other documents, and heard counsel, assoilzie the Defenders from the conclusions of the summons and decern (2).

On appeal,

June 8, 10. The *Lord Advocate* (Rt. Hon. *John McLaren*), and Mr. *Davey*, Q.C. (with them Mr. *MacClymont*), contended for the Appellant, that the decision of the Court of Session, ordering the payment of a casualty to the *Rossmore* trustees, amounted to an eviction of part of the subjects conveyed by the Respondents to the Appellant. The disposition contained an absolute clause of warrandice, of not only the lands, but also of the writs: see Lord *Glenlees'* opinion in *Hamilton* v. *Montgomery* (3) and *Brigg's Trustees* (4); 31 & 32 Vict. c. 101, s. 8. Amongst the writs so assigned and warranted were the decree of forfeiture, and the Crown charter following it, if these had not been reduced the Appellant could not have suffered the eviction complained of.

Where the clauses of the disposition are ambiguous, and it is impossible to say what were the obligations undertaken by the clause of warrandice, and which of two possible estates the words may mean the parties intend to pass for conveyance—and here it was so—the disposition must be interpreted by the light of

(1) Lord *Young*.

(2) Court of Sess. Cas. 4th Series, vol. v. p. 1076; 15 Scot. Law Rep. 718.

(3) Court of Sess. Cas. 1st Series, vol. i. at p. 361.

(4) Court of Sess. Cas. 2nd Series, vol. xiv. p. 173.

the writs—of which a full inventory was attached to the disposition—and the collateral correspondence: see *Best* on Evidence, p. 313. By these it could not be contended that the Respondents had any other intention at the time of the conveyance than to convey to the Appellant the consolidated estate they possessed and held of the Crown, and to warrant this to him. Then, thus reading the disposition as a whole, it appeared that the estate the Appellant now held was different—and different in substance—from that they bargained for or purchased. Even taking the most limited meaning, there had been a breach of the warrandice, inasmuch as the Appellant had been deprived of the use of the writs warranted: see *Hamilton* v. *Montgomery* (1) as to the effect of an assignment of writs. The estate of lands and that of superiority were sold together as one consolidated estate, therefore it would have been improper and contrary to practice to have two dispositive clauses, and two clauses of warrandice in the disposition.

[Also commented on *Gordon* v. *Hughes* (2).]

(2.) *As to concealment:* The Respondents' agents were not justified in withholding from the Appellant the information that an adverse claim to the superiority had been put forward so recently before, nor in persisting in what turned out to be a false representation, that the lands were held of the Crown: even though they honestly believed that such a claim could be successfully resisted at law.

[THE LORD CHANCELLOR:—In *Wilde* v. *Gibson* (3), Lord *Cottenham*, L.C., refers with approval to *Legge* v. *Croker* (4). There the lessor had assured the purchaser that there was no right of way; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out there was a footway, the presentment applying only to a carriage way, and the lessee was convicted for obstructing it, whereupon he filed his bill to be released from the lease; but Lord *Manners* dismissed his bill, saying, "If there were a wilful

(1) Court of Sess. Cas. 1st Series, vol. xii. at p. 353.
(2) June 15, 1815, Fac. Col. vol. xviii. p. 428; reversed H. L. 1 Bligh. 287.
(3) 1 H. L. at p. 626.
(4) 1 Ball & B. 506.

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL.

misrepresentation, the Plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way; it cannot be called misrepresentation."]

It was the duty of the sellers' agents to give notice of any substantial claim which might affect the value of the property. They must either give a warrandice securing the purchaser from loss, or else inform him.

[LORD BLACKBURN :—In policies of insurance it is so, but they are an exception. But in cases like this, if a man *bonâ fide* thinks the claim is not tenable is he to frighten the purchaser by telling him of it? I should say not.]

If the Appellant had been informed, he would as a prudent man either have insisted on an express agreement with the sellers to relieve him of the expense of the threatened litigation, or if he undertook the risk he would have been entitled to modify the price of the estate.

The Appellant was kept from inquiry by the sellers' agents' representations; and they must make good the representation. In *Burrowes* v. *Lock* (1) *C.'s* trustee informed the Plaintiff that *C.* was entitled to £288 under a will, and had an undoubted right to make an assignment to that extent; knowing that he had not a right to make such an assignment, having nine years previously created an incumbrance upon it to nearly that extent. The trustee pleaded forgetfulness of the prior circumstances; he was held liable on the ground that he was guilty of gross negligence in taking upon himself to aver positively a fact without giving himself the trouble to recollect. See also *dictum* in *Clarke* v. *Manning* (2). Nor could the Respondents be allowed to retain the advantage gained—a higher price—by misrepresentation: *Flight* v. *Barton* (3). There *A.* entered into an agreement for an under-lease without previously inquiring into the covenants of the original lease; and informed the lessee of the nature of the trade he intended to carry on in the premises; and the lessee did not inform him that there was a covenant in the original lease pro-

(1) 10 Ves. 470, at p. 475. (2) 7 Beav. at pp. 167–8.
(3) 3 M. & K. 282.

hibiting such business. It was held that the silence of the lessee was equivalent to a representation that there was no such prohibiting covenant. It was not necessary to establish that the sellers' agents intended to deceive the purchaser: *Hart* v. *Swaine* (1). There a man took upon himself to make an assertion not knowing the fact, and was held liable: so in *Slim* v. *Croucher* (2), *A.* was held liable for misrepresentation made innocently. The Respondents' agents, here, knew a fact which should have made them hesitate before they made the assertion that the lands were held of the Crown. They decided the question themselves without giving the Appellant a chance of making inquiry himself, and therefore they must be bound in the consequence.

[They also cited Lord *Eldon's* opinion in *Butcher* v. *Butcher* (3)].

Mr. *E. E. Kay*, Q.C., and Mr. *Asher* (of the Scotch Bar), appeared for the Respondents; but were not called on to address the House.

The following judgments were delivered by the Law Peers:—

LORD SELBORNE, L.C.:—

Your Lordships have heard this case very fully argued on the part of the Appellant, and I believe that none of your Lordships feel any doubt that the judgment appealed from is correct, and ought to be affirmed.

There are two points quite distinct from each other, namely, the question of warrandice in the terms of the deed of conveyance, and the question of a collateral representation.

With regard to the warrandice the matter stands thus:—Upon the face of the deed there is no mention whatever of the tenure of the lands sold, as to whether they are held from the Crown direct or from a subject superior. There may be said to be three subjects conveyed. The first is described as "all the lands of *Monkcastle* with their pertinents." Beyond all question these words are as applicable to the lands of *Monkcastle* if held from a subject superior as if they were held direct from the Crown, and as far as

(1) 7 Ch. D. 42. (2) 1 De G. F. & J. 518.
(3) 1 Ves. & B. at p. 98.

H. L. (Sc.)
1880
BROWNLIE
v.
CAMPBELL.
Lord Selborne, L.C.

that goes if the purchaser gets these lands which are there described, by whichever tenure they are held, he gets what is conveyed to him. Then follow the words, secondly, "together with all right, title, and interest belonging or that shall belong to us the whole grantors hereof." I do not understand that it is suggested that he has not got "all right, title, and interest" which did belong or should belong to the grantors, whether he gets a feu held under a subject or under the Crown. If, as happened in this case, there was a *de facto* holding under the Crown voidable or reducible, and, after reduction, convertible into a holding by the subject, that was the "right, title, and interest" which at the time "belonged to the grantor hereof" for better or for worse; and that he has taken.

Then, my Lords, come the words, "And we, with consents foresaid, assign the writs and have delivered the writs numbers one to five inclusive, eight and twenty-six to twenty-nine inclusive, and number forty-one of the inventory annexed, and signed by the said Mrs. *Anna Maria Campbell* or *Miller* as relative hereto." The case that has been cited of *Hamilton* v. *Montgomery* (1) determines the effect of such an assignation, namely, that it is an assignation of a right to the writs for the purpose of maintaining the grantee in the possession of the things conveyed. If, therefore, he has that which is conveyed according to the true construction of the deed, there can be no loss by reason of any defect in the writs. That brings your Lordships back to the original question, What was the subject conveyed? The warranty in general terms which follows, and which applies no doubt to all the things conveyed, and to the goods assigned, does not, as I conceive, my Lords, warrant the writs for any other purpose than the purpose expressed in the words of assignation. It does not enlarge the effect of the assignation in any way whatever; it certainly does not amount to a specific warranty as applicable to each and every of these particular writs that they shall have a specific effect in point of law.

My Lords, it would be, I think, a very alarming doctrine if your Lordships were for the first time to lay down, contrary to any authority which has been cited, or at all events without the least support from authority, the doctrine that the effect of such a

(1) Court of Sess. Cas. 1st Series, vol. xii. p. 349.

warranty as to scheduled writs is exactly the same as if a special contract were entered into as to each particular writ warranting not only that the writ shall be forthcoming to be used, whatever its value and effect may be, for the defence of the title, but that the writ is warranted itself as an effectual document to pass in law, without the possibility of challenge or reduction at any future time, whatever upon its face it appears to deal with. I suppose the practice is to put into such an inventory all the writs relevant to the title without the least idea whatever that special obligations are being undertaken with respect to each and every one of them. The natural meaning (and the authorities seem to shew that it is the legal meaning) of these words of warrandice is simply, that, for the purpose of giving effect to the assignation preceding, and for no other purpose, the writs are warranted. If they are wanted to be produced, they are to be forthcoming and to be handed over.

I think therefore the conclusion is, that unless you can import from the writs into the dispositive language of the deed something which is not there expressed, the argument upon the warrandice must entirely fail. As to importing into the deed, from the description of the writs, anything which is not in the dispositive part of the deed, it is not necessary to dwell upon that, because it appears to be inconsistent with any sound principle of construction known, I believe, either in *Scotland* or in *England*.

I pass, my Lords, from the point of warrandice to the point of representation. Upon the doctrine of representation no authorities have been cited in support of the argument at the Bar, except some which belong, as I conceive, to an entirely different category, cases like *Burrowes* v. *Loch* (1), *Slim* v. *Croucher* (2) (if that is to be treated as a case upon representation), and the like. They are simply of this sort. A man is going to deal for valuable consideration with a particular subject, and the value of the return which he is to receive depends entirely upon a particular fact, which is, or ought to be, in the knowledge of a particular person —in one of those cases a trustee, in the other the lessor and landlord. In the one case the question was whether notice of any prior incumbrance upon the trust fund had been given to the trustee. That was a question of fact, and the whole value of the

(1) 10 Ves. 470. (2) 1 De G. F. & J. 518.

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Selborne, L.C.

intended security depended upon it. In the other case the question was whether the landlord was in a position to grant the lease upon which money was to be lent. There also the whole value of the intended security depended upon the answer to the question, to be given by a person within whose knowledge the fact ought to have been, and in point of fact at one time or another necessarily was. If his memory had failed, still it was the case of a man who once had certain knowledge of the fact, and who could have no right to assert one way or the other a fact as of his own knowledge upon such a subject unless he possessed that knowledge; and if he did assert it, he was bound to make the assertion good.

The mere fact of forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse; because if he had spoken the simple truth he would have said, "I do not recollect whether it is so or not." If the fact be that he does not recollect, then by saying that the fact was so, or by saying that the fact was not so, he takes upon himself the responsibility of a positive statement, upon the faith of which he knows that the other man is going to deal for valuable consideration.

The principle of the law in all such cases is perfectly clear; but, my Lords, I apprehend that they have no application at all to a case of vendor and purchaser like that now before your Lordships. There is a statement in the particulars of sale, and that statement is referred to in the course of the correspondence. Of course, if there were fraud it would make all the difference in the world; but assuming that there is no fraud, there is a mere statement in the particulars of sale referred to, and, if you please, repeated in the correspondence during a negotiation preliminary to a contract. The terms of that contract are expressly understood by both parties to be, that an error in those particulars is a thing which is to be at the risk of the purchaser; and that the vendor does not mean to warrant the correctness of those particulars in all points, or even in all points which may affect the value of the property. The principle *caveat emptor* is there at all events *primâ facie* applicable. The contract is ultimately entered into

upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, as far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived.

I find the doctrine in *Scotland* laid down by Mr. *Bell* in his "Principles" in these terms: "When there is any room for doubt, the purchaser must secure himself by distinct warrandice, under which he will have action for the subject of that warrandice. If there be no warrandice, he can have remedy against the deficiency only on one of two grounds; either he must make out a case of misrepresentation and fraud, or he must prove an *error in substantialibus* sufficient to annul the whole contract. He can have no remedy on the principle of the *actio quanti minoris* (1)" of the Civil Law. My Lords, we must consider whether here there is any case of misrepresentation and fraud made out; if not, there is certainly no "*error in substantialibus* sufficient to annul the whole contract," and the purchaser is not to have any remedy upon the principle *quanti minoris*.

It appears to me that the cases which have been decided in this country and in *Ireland* are to the same effect. During the course of the argument I called the attention of the learned counsel for the Appellant to what was said in the judgment given in this House by Lord *Cottenham* in the well-known case of *Wilde* v. *Gibson* (2), and more particularly to the case of *Legge* v. *Croker* (3) there referred to, apparently with approbation, which was before Lord *Manners* in *Ireland*, and which had in some respects a close resemblance to this case. There a positive statement was made that there had been a decision against a right of way. It was *bonâ fide* believed that there had been such a decision, but when it was examined it was found not to exclude every sort of right of way, but only a certain kind; and one other kind, not excluded

(1) Bell's Prin. sect. 893. (2) 1 H. L. 620.
(3) 1 Ball & B. 506.

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Selborne, L.C.

by it, remained, and was eventually established. That representation having been believed to be true at the time it was made, and having been made in good faith, it was held, after conveyance, by the Court, that it was no ground for relief in equity, either by way of compensation, or by setting aside the contract.

I do not think that the case recently decided by Mr. Justice *Fry* (1), which was mentioned at the Bar, is at all inconsistent with that. That was a case in which a representation that land was freehold which in point of fact was copyhold was made under circumstances bringing home knowledge as strongly as anything in the world could do to the person who made it. And besides that, there was an express covenant which shewed that, as between the vendor and purchaser, no such risk was meant to be undertaken.

Now, my Lords, these being the principles, the question remains as to the facts. I will state them (without reading the details), as I understand them. The Dukes of *Hamilton* were superiors of this *Monkcastle* property until at all events the year 1813. *Douglas*, Duke of *Hamilton*, being then dead, and having, as is now stated, before his death made a will by which his title to the superiority of this *Monkcastle* property passed to his daughter, afterwards Lady *Rossmore*, but that title not having been in any way feudalised, or taken up, or made public, so as to be known to persons who were not intimately conversant with the circumstances of the *Rossmore* family,—in 1813, what is called in the old Scottish Act of 1474 a decreet of declarator of tinsel of superiority was obtained by the vassal entitled to the *dominium utile* of these *Monkcastle* lands. It was taken against the late Lord *Derby* as heir of line to *Douglas*, Duke of *Hamilton* (manifestly it could not have been taken against anybody else), by a person who was wholly ignorant of the latent title of the trustees of Lady *Rossmore* under the Duke's *mortis causâ* disposition. The effect, according to the statement of the learned Judges in the Crown Court below, was this: to obtain an infeftment directly under the Crown on account of that not being properly given by the representative of the Duke of *Hamilton;* so that from that time forward there was a holding under the Crown, though that particular pro-

(1) *Hart* v. *Swaine*, 1 Ch. D. 42.

ceeding had only a temporary effect: it did not permanently annul the Duke's right of superiority, but only avoided or rather suspended it during the lifetime of the vassal who obtained it. But that vassal who obtained it lived, as is stated by one of the learned Judges, Lord *Deas*, until 1847, for thirty-four years, and in that year the Act of Parliament was passed which enabled a permanent title of the same nature from the Crown to be obtained by the form of proceeding which in this case was actually taken two years afterwards, that is to say, in 1849. Those proceedings were taken, as the proceedings of 1813 had been, against the heir of line, Lord *Derby*; and so we find that there has been in point of fact a continuous holding as from the Crown by the temporary decreet of 1813 until 1847, and since 1849 by a decreet made under the Act of 1847, which if the right person had been served would have been permanent and perpetual. There has been a *de facto* holding under the Crown during all that time, and during all that time there is no trace of any assertion of the *Rossmore* title at all.

Now, in that state of things, I think your Lordships would be of opinion, even if you had not the evidence which you have from Mr. *Carment*, that no doubt was really entertained by the persons from whom the Appellant bought that they had got a complete statutory title and did actually hold to all intents and purposes under the Crown. Manifestly it was not for their interest to take steps which were erroneous in point of law or ineffectual in point of law. It cannot be doubted that they acted with a view to make a complete title according to the state of their knowledge, and did everything which it was possible for them to do for that purpose; and they held without disturbance accordingly.

Well, then, what happened to shake that belief? Nothing, my Lords, but this: there was a correspondence shortly preceding the sale to the present Appellant in the year 1873. On the 9th of October of that year the solicitors for Lord and Lady *Rossmore*, or rather for the *Rossmore* trustees, who, in a letter which they then wrote, were said recently to have made up a title, which in that letter was stated to include the superiority of the *Monkcastle* estates, those solicitors wrote a letter to Messrs. *M'Ewen & Carment*, the vendors' solicitors, in which they did make

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Selborne, L.C.

the assertion that by the title recently made up by Lady *Rossmore's* marriage trustees, the superiority of the *Monkcastle* estates was in them. Is that mere assertion to be taken as enough to have suggested a serious doubt of the title under which the vendors had been holding for so many years, unless something more followed to make that doubt substantial? It was met immediately by a contradiction, and by another assertion that the estate of *Monkcastle* was held of the Crown, and that the superiority to which Messrs. *M'Innes & Macfarlane* had referred was extinguished by a decree dated the 27th of June, 1849, under the Act 10 & 11 Vict. c. 48. How was that met by the representatives of the *Rossmore* trustees? They asked, indeed, to see the decree. The decree was publicly recorded and registered, and they had nothing to do but to go and inspect the register in order to see it if they wished. Messrs. *M'Ewen & Carment* in the first instance, for reasons of convenience, said that they could not send the writ.

The correspondence proceeded; and in the course of that correspondence, after a reference made to that decree, the solicitors of the *Rossmore* trustees do not at all appear to have persevered in their claim to a superiority, do not appear at all to have disputed that there was such a decree, or to have expressed any doubt on their part that it really had the effect which it was asserted to have, and I have no doubt was *bonâ fide* believed to have, on the part of Messrs. *M'Ewen & Carment*; on the contrary, they wrote to say they had a claim to make upon that very footing. They say, "We shall be glad to know how you propose to settle value of the superiority due to the *Rossmore* trustees which you know your clients are liable for under sect. 13" of the very Act under which the proceeding had been taken to extinguish the *Hamilton* superiority.

On the other hand, that was disputed. Messrs. *M'Ewen & Carment* said that they took a different view of the effect of the 13th section, and did not believe that there was any such value to be paid for, and if there were, inasmuch as the 13th section said that it was only to be the balance over expenses, there would be no such balance. The correspondence went on: and I fail to find in it any trace of any different attitude assumed on

either side. The conclusion, therefore, is that there was nothing in the correspondence calculated to suggest a doubt that the title was really a title under the Crown.

Well then, what remains? Why simply this. The negociation is entered into with the present Appellant who is disposed to purchase this property. He asks undoubtedly, How is it held? He is referred to the particulars, which said that it was held from the Crown, and in the letter to which he is so referred there are words which undoubtedly have reference to such a Crown title. But it does not stop there. The correspondence with him, as it proceeds, before any agreement is come to, contains more than once a clear and express stipulation that if he buys at all he is to buy under all the conditions of sale that were annexed to the articles of roup, and that stipulation is agreed to; and when you refer to the articles you find that it is expressly stipulated between the parties that the purchaser is to take the property with the risks of error in the particulars, and there is nothing to except error in this particular point. He does so; he signs the contract by which he agrees to do so. A conveyance is executed accordingly, without any warrandice, according to the view which your Lordships take, upon this particular subject. If it had been meant between the parties to insist upon this, and to take this particular matter of tenure out of the stipulation that the purchaser was to be at the risk of error in the particulars, it would have been easy to say so in the correspondence. It was not said. If it had been said and assented to, it would have been easy for it to be provided for in the conveyance. It was not so provided for.

It appears to me, my Lords, quite clear that all the statements and representations which were made on the vendor's part were perfectly *bonâ fide*, that he had very good grounds indeed for believing them to be true; nay, that he might even have had such grounds if he had had a knowledge, independently of the correspondence, of the *Rossmore* title, which there is no ground whatever for supposing he possessed; because the learned Judges in the Court of Session state that the question of law, even when all these facts were known, was one of very great nicety, as to which even the Judges who ultimately reduced the Crown title were of opinion that if the case had come to your Lordships' House it

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Selborne, L.C.

was quite possible that your Lordships, or any other superior tribunal, might have taken a different view. Under those circumstances, the facts as to the *Rossmore* title not being known, and the state of the law being such, I cannot for a moment doubt that the representation was perfectly true according to the belief of those who made it; and, that being so, any error in that representation so made was certainly covered by the express terms of the contract and the undertaking by the purchaser. Upon these grounds I submit to your Lordships that the interlocutors appealed from are right, and that the appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, if in the decision of this case we were about in any way to deal with authority as having established any of the propositions contended for by the Appellant, I should for my own part have desired a longer time to consider those authorities, to see how far they bore or did not bear upon the subject matter now before us. But, my Lords, the most striking thing in the whole argument of the very able counsel for the Appellant, has, to my mind, been the fact that there really has not been from beginning to end a single case or a single authority produced before your Lordships in argument, which seems to have even a remote bearing upon the question we are now called upon to decide.

The two points we are now called upon to decide are, first, whether there was a warrandice affecting the question now before us, and giving a right to the Appellant to be, in pursuance of that warrandice, indemnified for any loss he may sustain in consequence of the mid-superiority of those lands having existed, the existence of which the parties do not seem to have been aware of at the moment of concluding the contract, or, whether, if not upon that ground, the case can be rested upon a much higher ground, namely, a misrepresentation by those who conducted the sale on the part of the vendors.

Now, my Lords, the warrandice question has been conclusively dealt with. The Scotch authorities shew that it refers only to the assigning of writs, in other words the covenant for production, and not to collateral matters which are not contained definitely in the disposing part of the deed. I do not forget in that the argument

of Mr. *Davey*, that an assignment of writs carries with it also an implied warranty that those writs are good and valid in law, that was the effect of the argument. He said, If the right of the Crown which existed at the time of the sale being made was such that they were entitled to reduce, as they afterwards did reduce, one particular writ in question upon which a great part of the controversy depends, then the purchaser could not get that which is admitted by the writers upon Scotch law and the authorities to be his due, namely, the right which the assignment of writs carries with it to have those writs produced for proof of titles when any litigation may take place. Then he said, "I do not get what I bargained for. I do not get my writ because this particular writ in question has been reduced by the action of the Crown." No authority whatever was produced to shew that the effect would be to couple with the assignment of the writs and warrandice that every one of those writs should be indefeasible and valid at any time whatever when it might be produced.

My Lords, I apprehend that the authorities say that an assignment of writs has simply the effect of saying "We pass to you for your title all that we have; here are these writs as they exist in our possession; they have come lawfully and rightly into our possession." There they are, and this particular writ amongst them; they came properly into the possession of the vendors, and they assign their interest in those writs to the purchaser. No authority whatever can be produced to shew that the assignment goes beyond an assignment of the writs as they exist, and says, We guarantee to you the validity of every writ which is so handed over. If the warrandice were read as going beyond that, it seems to me that the effect might be extremely formidable. There are a vast number of titles which have long since been settled, as to which it would be very formidable to say that at a considerable distance of time the parties should be called upon to maintain the validity of the writs as well as to produce them when wanted *quantum valeant* for the purpose of maintaining the title. I need not go more fully into that part of the case, it has been amply discussed already.

The question of fraud is more interesting. There is nothing about which your Lordships are more careful than to see that in a

H. L. (Sc.)
1880
BROWNLIE
v.
CAMPBELL.
Lord Hatherley.

case involving, as this does, according to the course which the argument has taken, allegations of fraud and misrepresentation, no such fraud and misrepresentation shall meet with any success. But I confess that I was from the first moment a good deal startled at the extent to which one of the learned counsel for the Appellant, the Lord Advocate, endeavoured to push the doctrine of misrepresentation, though I thought Mr. *Davey* appeared to resile from the extent to which that argument had been pushed. He went thus far: not only would the solicitor for the vendor be answerable for any fraud or misrepresentation he had made, but he should be answerable, and through him his principal should be answerable, for any silence and non-disclosure or non-discovery of the facts which it might be of some importance to the purchaser to know, even whether he were or were not interrogated as to those facts. If it is with a fraudulent intent that the disclosure is not made, and the facts are kept back for the purpose of deceiving those with whom he is treating, that is one thing; that might be dealt with as fraud; but to say that a person who is aware that claims have been made should tax his memory without any question being put to him upon the subject, and that he should be bound to remember all the claims which have been made, all the persons by whom they have been made, and all the grounds upon which they have been made, would be a doctrine which would be extremely alarming to all those who have to deal with estates. It is next to impossible for persons who are largely concerned in the buying and selling of estates to carry in their memory, especially when unchallenged, all the various attempts which may have been made by different persons to raise claims with regard to those estates. There are estates which are in a state of chronic litigation by parties who believe that they have some title, a fanciful one for the most part, and who constantly go on putting forward a claim because it is difficult to ascertain the exact rights of the parties, there being other persons in the same position as themselves, and the number of possible claimants being spread out very widely and largely. An illustration of that is afforded by the old case which is well known in Chancery by the name of *Jenning's* Estate, and there are one or two others, to say nothing of other more recent litigation. To say that all the

persons dealing with such estates at all were bound to communicate the fact of so many people having made claims, although the claims were never pushed forward into active operation, would certainly raise a new head of equity which would be destructive of all tranquil possession of property whatever.

That argument, I am happy to say, was not proceeded with further by Mr. *Davey*, and was at no time supported by authority. It is quite a different thing when a question is asked with reference to a particular fact, and an answer is given "Yes" or "No" as to that fact *simpliciter*. The person who gives that reply must be answerable for the effects of his representation. Whether or not he *bonâ fide* was aware and had treasured up in his memory the existence of certain facts connected with the property, he would be answerable if he took it upon himself to say that such and such a thing had not occurred or had occurred. The only proper answer for a man to make is what he knows, and if he asserts that such a thing happened when the question is asked of him as a matter of business, he is bound to make that representation good; he is not at liberty to say afterwards, "I had no recollection on the subject. I really did not remember whether it happened or not." If that was the state of his mind he ought to have said so when he was asked the question. He ought to have said, "I have an indistinct recollection of it, but I know none of the facts." He ought to give, in fact, the proper answer for a man to give who is speaking the truth. He is asked the question as a matter of business, and he knows that the person who asks him is going to act upon it; then he is bound to give him no false representation; and it is a false representation when he represents that he knows a fact if he does not recollect the fact to be so; if he states as that which he knows himself what he has simply a dim recollection of without having any certain knowledge whatever upon the subject.

I am not, my Lords, going into any length upon this case now after what has been stated by my noble and learned friend on the woolsack, but I think that what struck Lord *Deas* very much most have struck all of your Lordships in the course of the argument with reference to the contention that these representations were false representations, especially the representation that the property was held of the Crown. Lord *Deas* says this: "If Mr.

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Hatherley.

Brownlie" (that is the Appellant) "had made his purchase and been infeft under the Crown prior to the 22nd of February, 1872, I do not see how his position as a singular successor could have been afterwards assailed, and it was a narrow enough question, although not made so prominent in the former case as it deserved, whether the sellers were not entitled to assert a similar privilege. Be this as it may however, I cannot think it surprising if, when a claim to the mid-superiority was made for the first time, in October, 1873, the agents for the proprietors of *Monkcastle* regarded it as a claim not likely to be pressed to judgment, or, at all events, not likely to be successful. If such was their *bonâ fide* opinion, I am not prepared to say that there was such a duty of disclosure as made it incumbent upon them, on behalf of their clients, to communicate to intending purchasers the fact that an adverse claim had been made to the mid-superiority; and still less can I hold that their not having done so necessarily infers either fraudulent misrepresentation or fraudulent concealment, so as to render competent the present claim."

Now this he comments upon, particularly "Mr. *Brownlie* himself, after he had mastered the facts and examined all the titles and documents, seems to have formed an equally confident opinion with the sellers' agents that the objection of the *Rossmore* trustees to the decree of forfeiture of 1849, and their claim to the mid-superiority, were untenable. On the 14th of September, 1875, he addressed to Messrs. *M'Ewen & Carmant* the following letter, under the signature of his professional firm:—'We wrote you on the 10th inst., and we have this morning received from Messrs. *McInnes, Macfarlane, & Co.*, the titles of Lord and Lady *Rossmore's* trustees, per inventory we send you enclosed, along with copy, notarial instrument in favour of the trustees, recorded in the *Ayrshire* division of the General Register of Sasines, 22nd February, 1872.' It appears that, until the recording of the above notarial instrument, no infeftment whatever had been passed in favour of any of the disponees of *Douglas*, Duke of *Hamilton*, as regards this property, although that Duke granted the general disposition and settlement so far back as 29th July, 1796 (recorded in the books of Council and Session, August 7th, 1800), and his trustees had registered a decree of adjudication in imple-

ment, 13th August, 1805. If such is the case, the proceedings raised by *Alexander Miller* in 1813, and by *William Campbell Miller* in 1849, were surely directed against the proper parties when directed against the nearest heirs of the Duke last vested in the superiority." That is what had been done, which turned out afterwards not to be effective in consequence of the title of Lady *Rossmore's* trustees. Then he says, "We will be obliged by your returning us the enclosed copies after perusal, with any suggestion or remark you have to make." Lord *Deas* adds, and I read this because I so entirely concur in the observations he makes, "I refrain from quoting the letters written by Mr. *Brownlie* to the agents for the *Rossmore* trustees, because in these he might naturally be expected to depreciate his adversaries' case. But in writing the above letter to the sellers' agents at the time he did so, I can see no motive he could have had for expressing the opinion contained in it unless it had really been his own professional opinion. I attach some importance to this, because I am satisfied from Mr. *Brownlie's* letters that he was just as well qualified to form an opinion as to the legal objection taken to the decreet of forfeiture as the sellers' agents were."

It comes, in fact, to this; these gentlemen seem to have had everything that might lead them to a *bonâ fide* conclusion that the title was, as they asserted, in the Crown, and that the mid-superiority was not, as it turned out afterwards by decision to be, in Lady *Rossmore's* trustees. Can it be said that in such a state of things a solicitor is bound to enter into all the reasoning that has led him to a certain conclusion, when he has *bonâ fide* come to that conclusion, and when such a conclusion is one that it is perfectly natural that he might come to, considering all the circumstances of the case? I apprehend, my Lords, that in that case the attention of both parties being directed to the fact, and Mr. *Brownlie's* letter, and the opinion there expressed by Mr. *Brownlie* appearing to coincide with the opinion which was held by the solicitors for the vendors, it is perfectly impossible to say that that approaches within any appreciable distance of the cases which have been decided upon representations made, or silence kept, with regard to that which the vendor was bound, acting in good faith towards those with whom he was dealing, to have dis-

H. L. (Sc.) 1880

BROWNLIE v. CAMPBELL.

Lord Hatherley.

closed. Nothing here appears to me to amount to anything like that.

I think the case fails entirely with regard to the warrandice, and that no bad faith of any description whatever can be imputed to the vendor, or can entitle the purchaser to be compensated in the manner which is sought for by the present litigation in *Scotland*, out of which this appeal arises. I therefore entirely concur in the correctness of the decision which was arrived at by the Court below, and in the motion which has been proposed by my noble and learned friend on the woolsack.

LORD BLACKBURN :—

My Lords, I also entirely agree that it is not necessary to hear the learned counsel for the Respondents, as I think the judgment of the Court below is perfectly right.

It appears that in this case there was a conveyance actually executed, after some communings and bargainings between the vendor and the purchaser contained in letters giving particulars of the estate and in articles of roup. After communings of that sort there ensued a conveyance in a form which is usual and common in *Scotland*, and having in it, as such forms always have, a warrandice amounting to or analogous to a covenant of the vendor having good title ; and the first question is whether the warrandice applies to the present case. Now, I take it, that it is of the very greatest consequence in everything that is connected with conveyancing, that where there has been a sense put upon the ordinary usual conveyance, so that it is understood by conveyancers, and acted upon in practice by conveyancers, as meaning a particular thing that should not be deviated from, or upset, or altered. Hundreds of existing titles have been made depending upon the ordinary conveyance having the sense, which by the practice of conveyancers it is supposed to have, and in every future case of a conveyance if a doubt had been thrown upon the sense in which it was to be understood, there would be further inquiry, and probably further litigation, as to the form in which the conveyance should be ; I think that would be in the highest degree objectionable.

If in this case there had been any case cited throwing the least doubt upon what the Court below have said, if there had been

any authority to the contrary, anything requiring us to consider what was the opinion of the learned Judges who decided this case in the Court below as to the practice and understanding of conveyancers in *Scotland* with respect to the meaning of a deed of this sort, I quite agree with my noble and learned friend who spoke from the opposite benches, that it would have been desirable for us to consider the case very carefully indeed, in order to settle whether those cases were to be overruled or not. But no such case has been produced, and, taking it to be clearly understood that such a deed means this, according to the practice of conveyancers in *Scotland*, I think that it should be so held, and that we should not throw the least doubt upon it. If on any future occasion a purchaser thinks that the warrandice, as thus understood, is not sufficient to protect him, he may ask from his vendor (if he can get it) a special warrandice to a greater extent. If we had decided the other way, and had held that the warrandice, especially as to the writs mentioned in the schedule, was to have the effect which was contended by the learned counsel, Mr. *Davey*, at the bar, to be the effect of it, I think the result would have been that every vendor, at least every well-advised vendor, in future would have put in an express condition that he was not to be bound to that extent. As it is, every future buyer may, if he pleases, ask for such a warrandice, and if the vendor chooses to give it, well and good, that is his look-out. But I do not think we can hold that the existing warrandice goes so far. Therefore upon that ground I feel no hesitation in saying that the Court below were right.

My Lords, there is a second ground, however, which has to be considered, and upon that I feel even clearer that the Court below were right. I quite agree that, although this is an executed conveyance, yet if it had been shewn that there had been fraud inducing the contract, any *dolus dans locum contractui*, the conveyance might be set aside, unless something had occurred to prevent it. I will assume, for the purpose of argument, what I believe is not yet settled in *Scotland*, that, although the contract were not set aside, you might have an action to recover damages; such would be the English law, though I believe it is not settled in *Scotland* I will take that to be so; is there anything here

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Blackburn.

amounting to fraud, any *dolus dans locum contractui*, that may be founded upon?

I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such. I further agree in this: that when a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say, as at present advised. And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also.

Now, my Lords, did either of those things happen here? I think not. The particulars of sale put before the purchasers were connected with the original articles of roup. They said in express terms, What we are now selling, you must satisfy yourself about, for we will not be bound. Those are not the precise words, but that is the effect of it, and, that being the case, there is no doubt whatever that what was said was, There are the titles; it is held from the Crown. And equally there is no doubt that not only the parties, the ladies, who, I daresay, had not the least notion of what holding from the Crown meant, but also their solicitor, Mr. *Carment*, acting as their agent, and for whom they are responsible,

said it was held from the Crown. They believed that they were holding from the Crown, and in fact they were holding from the Crown then. No doubt also he at that time firmly believed that the steps which had been taken to put an end to the mid-superiority were effectual, and that they were not only holding from the Crown, but were indefeasibly holding from the Crown. At the time when he first issued these articles of roup and particulars nothing had been suggested which threw the least doubt upon his reason for *bonâ fide* believing this.

Afterwards, but before he began his communings with the present Appellant, *Brownlie*, he received letters from the agents for Lady *Rossmore*, which have been repeatedly read, and which amount to this. We make a claim saying that Lady *Rossmore* has a mid-superiority, and we claim to have a casualty as mid-superiors. The answer was, You have nothing of the sort, for we destroyed the mid-superiority effectually by a decree of adjudication in, I think, 1849, mentioning the year. The answer, I think, comes to this fairly; if so, we are entitled to some compensation: I wish you would tell us what it is. That would have been a claim not upon the land, but upon the individual vendor, which he would not have got rid of by selling the land. The answer sent by Mr. *Carment* was to the effect, This claim I do not at all admit, and I do not think you have any such claim, and I cannot possibly help you by shewing you the title-deeds. After that he is applied to by Mr. *Brownlie*, and he does refer him to the articles of roup and the particulars that were given, and so he does after this repeat his assertion which he had made before, namely, The estate holds from the Crown, but you must look into it for yourself (that is what it comes to) and be satisfied about it; I do not warrant that lands are held from the Crown, but I say it is so. Now if those previous letters which he had received from the agents of Lady *Rossmore* had conveyed to him full knowledge that this was untrue, and that really the title from the Crown was defeasible because they had not served the right party, and because he knew that the effect of that would be to render the whole thing void, I am not prepared to say (it would be a question to be considered) whether in repeating his assertion after he had had that knowledge, he would not have been saying what would

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Blackburn.

amount to fraud, what would have been a lie in fact for the purpose of deceiving the other side. I am not convinced that he would have been doing so. But when I look at the facts upon the evidence, I think the matter falls as far short of that as could reasonably be.

The utmost that has been said in argument is, that after receiving these letters he might have looked into the matter, and if he had looked into the matter he might have found out that the claim was well founded. But I apprehend, my Lords, that it is pretty clear law that the mere means of knowledge is not the same thing as knowledge. That was laid down by Chief Justice *Tindal* in a case which I have before me, namely, *Bell* v. *Gardiner* (1). After stating that there was some doubt thrown out in other cases, and citing *Kelly* v. *Solari* (2), he says: "*Kelly* v. *Solari* is decisive upon the point, and establishes that it is not necessary to the validity of such a plea that it should negative the existence of the means of knowledge as well as actual knowledge. We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself." That I apprehend is quite right.

There have been two or three cases cited which I think do not proceed upon that ground, although there is a little confusion about them. The Courts of Law had to refer fraud, in which knowledge was an essential ingredient, to a jury, and Chief Justice *Tindal* is speaking of that. A Court of Equity had to find it for itself, and consequently the Judges in Courts of Equity were not driven to be so precisely accurate in stating exactly whether they were going upon the ground that there was a contract or warranty that the thing was so, or whether they were going upon the ground that the party, knowing it was not, and representing that it was, had committed a fraud in doing that. Most of the cases (the leading one is *Burrowes* v. *Loch* (3), and it is sufficient to

(1) 4 Man. & G. 11, at p. 24.
(2) 9 M. & W. 54.
(3) 10 Ves. 470; *Clarke* v. *Manning*, 7 Beav. 162; *Flight* v. *Barton*, 3 M. & K. 282.

mention that, though there were others) when looked at, if they do not absolutely amount to contract, come uncommonly near it. In *Burrowes* v. *Loch* a man proposing to lend money on the security of an equitable assignment of a share of what remained due on account of the residue of a testator's estate, went to the trustee who held the fund and asked him, telling him the facts, "I am going to lend money upon the security of this share, has any prior loan upon this been communicated to you so as to make you have prior notice, so as to make that other loan come in before me and cut me out, tell me that, in order that I may know whether I will lend the money or not." The party on the other side answered, "There has been none such." To say that that is not warranty or contract that he has received no such notice is, I think, going very near the wind; if it was not that it was so uncommonly like it, that I cannot make the distinction myself. That would have been sufficient for the Master of the Rolls to say, "You have warranted this." He also had considerable ground for doubting whether the man had really *bonâ fide* forgotten. The man, he seems to have thought, had thought this, "I will not take the trouble of a search," the fact being that he really knew nothing about this and would not take the trouble of looking, but he boldly made the assertion, "I know there is none," saying as a fact, "I know there is none," when the real truth could not be more than, "I am pretty sure there is none." If, when a man thinks it is highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false—it is positive fraud. That has been repeatedly laid down, and I think the more it is considered the more clear it becomes. If you choose to say, and say without inquiry, "I warrant that," that is a contract. If you say, "I know it," and if you say that in order to save the trouble of inquiring, that is a false representation—you are saying what is false to induce them to act upon it. I think all the cases which have been cited come round to pointing to that, but none of them, as far as I am aware, are in contradiction with that which I have cited from Chief Justice *Tindal*, and I think there are a good many other authorities to the same effect.

There is only one other point on which I think it is necessary to say anything, and that is, it was said, "At all events there is

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Blackburn.

an improper concealment here." Now, as I said before, I should say, whenever there is a duty to speak, when you have got anything to say and you keep it back in order that the other side believing that you, having said nothing, have nothing to say, it is very much the same as falsehood and fraud. But, my Lords, what is there here that would cast any duty upon him at all to speak? In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy. But in other contracts it is not so, and as my noble and learned friend opposite (Lord *Hatherley*) has observed with great force, it would be a monstrous thing if every solicitor, for selling an estate, were obliged to keep a schedule of all the idle claims that had been made—although some of them may perhaps ultimately turn out not to be idle—keep a schedule of all the claims of all sorts that have ever been made within his knowledge against his client, and shew them to intending purchasers. I never heard of such a doctrine, and I think if we proposed to bind people to do that we should do a great deal of mischief. There is no case in support of that. I never heard of one ever being cited, and it seems to me to be against principle that there should be one.

Taking that view of the matter, my Lords, and upon these grounds, I think the second point of fraud or concealment has been as rightly decided by the Court below as was the first, and therefore I agree with the motion which has been proposed to your Lordships.

LORD WATSON:—

My Lords, the claim of the Appellant, the purchaser of the estate of *Monkcastle*, is rested upon two grounds; the first being the warrandice in his disposition of sale, and the second alleged misrepresentation by the seller. My Lords, I entirely agree that

the judgment of the Court below is well-founded, and I concur in the opinions which have been delivered by your Lordships in the case.

The first question, which turns upon the clause of warrandice in the disposition of sale, is a pure question of Scotch conveyancing, and it relates to clauses not of any unusual or extraordinary character, but to clauses of ordinary style. The meaning put upon them by the Court of Session has been very ingeniously impeached, but there was no attempt on the part of the learned counsel at the Bar to contradict the statements of the law and practice made by the Judges in the Court below. We had a great deal of very minute criticism upon the particular terms of the clauses of this particular deed, which, as I have said, do not differ from the ordinary terms of deeds of disposition in *Scotland*. I mean deeds of disposition conveying the *dominium utile* of landed estates.

I understand the law as laid down by the Judges of the Court of Session and approved of by your Lordships to be, that under a conveyance in these terms, the subject of the conveyance consists of the lands and pertinents of the lands, and that the words "together with all right or title" are not intended to enlarge the conveyance, but are intended to express this, that in giving the lands the disponer gives at the same time everything vested in his person, which is necessary in order to make effectual the right of the purchaser to the lands themselves. Then follows an assignation of writs, but the purpose of that assignation is not to convey any new estate, or estate not falling under the dispositive clause, but to give to the purchaser a right to have and use the writs referred to and assigned for the purpose of defending himself against eviction from the lands conveyed in the dispositive clause. The warrandice clause undoubtedly applies to both of these, because it warrants, in the first instance, that there shall be no eviction from the lands themselves, and it warrants, in the second place, that if eviction is threatened these writs shall be forthcoming so far as necessary for defence against eviction, and that they shall be effectual for that purpose.

The first question to be considered is this,—Has there been eviction in this case? and that depends upon the answer to be given

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Watson.

to the other question, What is conveyed? I am of opinion with the learned Judges in the Court below, and with your Lordships, that this conveyance relates to the lands only and does not relate to tenure, and that there is no conveyance of lands subject to any particular holding, or any warranty that those lands are held by any particular tenure.

Now, passing from that point, an argument was founded upon the clause of assignation of writs, and it is said that no notice of that argument was taken by the learned Judges in the Court below. I am not at all surprised that the learned Judges should have taken no notice of it, because it really involves the very same question as that which I have discussed; the question, What is conveyed? If eviction is not threatened, what right has the purchaser to call for the production of these titles, or to complain that they are not forthcoming? The only purpose for which he gets the assignation and warranty applicable to writs, is in order that he may defend himself against eviction; and the right to call for them cannot arise until eviction is threatened. If an action had been raised for setting aside his right to the land, then he would have had a good claim upon his warrandice if the writs had been necessary for his defence, and had not been produced. But surely there can no claim arise under that clause so long as he is neither evicted nor threatened with eviction.

The next ground of action is representation, and it is perfectly clear, not only that that representation is not imported into this contract, but on the contrary, that the liability of the seller for having made such a representation is very carefully excluded from it. The representation was certainly made and was repeated —it was given to the purchaser at the time when he proposed to purchase at public roup, but he was fairly advertised at the very onset of the communings with regard to the sale by private bargain, that the seller would only transact upon the footing that the whole articles and conditions of the contract between them would follow the conditions and articles of roup, and one of the leading provisions forming part of those conditions is to the effect that the seller should not be bound by those representations, or by any representations of that class, and that the duty of inquiring and satisfying himself was to rest with the purchaser.

Of course that does not relieve the seller from any charge of fraud. If the representation was fraudulent, if it was made, in other words, in circumstances which amount to fraud in the eye of law, then the purchaser must have redress; whether in the form of this action, or in the form of a rescissory action, I do not at present give any opinion, because, as has been stated by the noble and learned Lord opposite, there is a great deal of difficulty in regard to that point as the decisions at present stand in *Scotland.*

I entirely agree with the observations which were made by the noble and learned Lord on the woolsack, distinguishing this case in its circumstances from the authorities which were cited at the Bar. In this case the representation made was the simple truth, and the only question is whether it was the duty of Mr. *Carment*, the agent for the seller, to qualify that statement, so far in itself correct, by further stating that circumstances had come to his knowledge which rendered it to his mind doubtful whether that decree of 1849, under which the estate was held, was a valid decree. My Lords, if I were satisfied from the circumstances in which Mr. *Carment* was placed at that time that the facts either within his knowledge, or which ought to have been within his knowledge, were such as reasonably to suggest to his mind that that decree was in serious peril, and that there was a serious risk of that title being challenged, I should not have come, with the same confidence at least, to the conclusion which I have formed upon this part of the case.

But I cannot find in the facts of the case anything leading me to suppose that Mr. *Carment* was in the wrong in withholding from the purchaser a statement in the truth of which he did not himself believe, and which, as I read the evidence, he had no cause for believing, for from the year 1813 downwards the property had been held of the Crown by reason of the heir of line, *Douglas* Duke of *Hamilton*, having declined to enter upon an action that was brought against him for that purpose; and from 1796 down to 1873 the persons who eventually established their right to the superiority which was extinguished by the two decrees of 1813 and 1849 had not only never preferred any claim to it, but

H. L. (Sc.) 1880 BROWNLIE v. CAMPBELL. Lord Watson.

had never even put their title on record until the year 1872. It does not occur to me that the simple statement that the superiority lands or the fee simple lands were mentioned in their title was sufficient to raise any doubt, or any reasonable doubt, such as Mr. *Carment* was bound to communicate. But not only so, in the correspondence with the agents for the *Rossmore* trustees he stated that a decree had been taken in 1849, and whether they were under the belief that their clients had been called as Defenders in that decree or not, the moment they received an intimation of that fact, which was an undoubted fact, they altered their claim from one for the restoration of the superiority to a claim for the allowance which the 13th section of the statute 10 & 11 Vict. c. 48, gives them in the event of the forfeiture of the right.

And, my Lords, that was not all. The correspondence dropped, and the claim was not insisted upon. The last intimation of their claim was to the effect I have mentioned. I am not going into detail upon this subject, which has been very fully and satisfactorily discussed by Lord *Deas*. It is very easy after a judgment of the Court to assume that the law should have been known to be so and so. Why, after all the discussion which took place in the case between the Appellant and the *Rossmore* trustees, Lord *Deas*, who delivered one of the leading opinions in that case, not only intimates that it might have been doubtful which way it would be decided, but rather suggests that if certain considerations present to his mind in deciding the present case had actuated him before, the conclusion at which he arrived might have been different. And you have this fact, which was referred to by the noble and learned Lord on my right (Lord *Hatherley*), that the agent for the purchaser having examined the *Rossmore* trust deeds, which had not been seen by Mr. *Carment* at the date of his representation, came to the conclusion in regard to the claim that there really was nothing in it; that the decree of 1849 was valid, and was directed against the right persons.

In these circumstances, this being a question not of fact known to Mr. *Carment* but of a legal opinion which he never did entertain, and which it cannot be said that he was reasonably bound to entertain, I do not think it can be brought up to a case of legal

fraud or of fraud of any kind so as to entitle the Appellant to the relief which he seeks. I therefore concur in the judgment which your Lordships propose.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 10th June, 1880.

Agents for Appellant: *Willoughby & Cox.*
Agent for Respondents: *Andrew Beveridge.*

END OF VOL. V.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

ACCEPTANCE—Bill of exchange—Signature of drawee—Scotch law - - 754
See SCOTCH LAW. 1.

ACCORD AND SATISFACTION—Pleading 374
See NEW SOUTH WALES, LAW OF. 2.

ACT OF STATE—Authority of Colonial Government - - - - - 102
See JAMAICA, LAW OF.

ACTION—For costs before taxation - 425
See LANDS CLAUSES ACT. 1.

ANNUITY—Income or capital - - 588
See WILL. 1.

APPEAL—For costs - - - - 582
See PRACTICE. 1.

—— Law of *Lower Canada* - - - 371
See CANADA, LAW OF. 7.

—— Time—Discretion of Judge—Order made in vacation - - - - 685
See PRACTICE. 2.

ARBITRATION—Canadian Railway Act - 381
See CANADA, LAW OF. 3.

—— Lands Clauses Act - - - 425
See LANDS CLAUSES ACT. 1.

ARTICLES OF ROUP - - - - 925
See SCOTCH LAW. 3.

AWARD—Validity—Canadian Railway Act 381
See CANADA, LAW OF. 3.

BANK NOTES—Duty on—Law of *Griqualand*
See GRIQUALAND, LAW OF. [842

BANKRUPTCY—*Double Proof*—32 & 33 *Vict. c.* 71, *s.* 37—"*In whole or in part*"—*Evidence.*] Where traders possess two properties, one situated abroad and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign Court takes possession of the foreign property, as under a *cessio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first account-

BANKRUPTCY—*continued.*

ing for what they have received abroad.—Two persons of the name of *H.* carried on trade in *Portugal* as wine exporters, under the style of *H. Brothers*, and the same two persons carried on trade in *London* as wine merchants, under the style of *H. & Sons.* The practice of the business was for *H. Brothers* to draw bills on *H. & Sons.* These bills were accepted in *London* and paid in *Portugal.* The traders fell into difficulties, and in December, 1877, presented a petition for adjudication under the English Bankruptcy Act. Proceedings in insolvency were taken in *Portugal*, after the date of the petition but before that of the adjudication, and the Portuguese Court took possession of the property there, and the Portuguese creditors received a dividend of about 8*s.* in the pound. These creditors then sought to prove under the English adjudication. This was refused otherwise than as a claim, until they had accounted for what they had received under the Portuguese insolvency:—*Held*, that this conditional admission of their claim to prove was correct.—*Selkrig* v. *Davies* (2 Dow. 230; 2 Rose, 97–291) followed, and *Ex parte Wilson* (Law Rep. 7 Ch. App. 490) approved.—The adjudication had relation back to the petition, from the date of which all the property of the traders abroad and in *England* became vested in the trustee.—The Statutes of Bankruptcy, 1861 and 1869, have no application to a case of two bankruptcies, either in the same country or in different countries, against identically the same individuals.—*Per* Lord *Selborne*:—The cases of *Maccabe* v. *Hussey* (2 Dow. & Cl. 440), and *Attwood* v. *Small* (6 Cl. & F. 232) in no way warranted the supposition that this House would, on appeal, admit evidence not presented in the Court below. BANCO DE PORTUGAL *v.* WADDELL - - - 161

BARONY TITLE - - - - 273
See SCOTCH LAW. 6.

BILL OF EXCHANGE—Form of—Acceptance—Signature of drawee—Indorsement—Scotch law - - - - 754
See SCOTCH LAW. 1.

BISHOP—Discretion—Church Discipline Act
See Ecclesiastical Law. [214

BONDHOLDERS—Railway company—Failure of undertaking - - - 176
See Failure of Consideration.

CANADA, LAW OF—*Donations—Revocability of Gifts par la survenance d'enfants du donateur—Ordinance of* 1731.] By a notarial deed, dated the 29th of May, 1866, the Appellant gave an annuity to the Respondent in trust for her five daughters "*pour partie de leurs frais de toilette et autres petits besoins personnels*," the capital sum being thereby settled upon the daughters after their mother's death. The gift was made soon after the Appellant came of age, and amounted to about one-hundredth part of her whole estate; and it was to be presumed from the circumstances that if she had contemplated having children she would still have made it:—*Held*, that, under these circumstances, by the law of *Canada* prior to the Civil Code (being that which existed in the jurisprudence of the Parliament of *Paris* before the Ordinance of 1731) the gift was not revocable on the birth of children.—The Ordinance of 1731 was not a mere declaration of existing law; and although it enacted that all gifts made by persons who had not children at the time of the donation "*de quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur*," yet such enactment did not take effect in *Canada proprio vigore*, never having been registered in *Canada*. —*Hutchinson* v. *Gillespie* (4 Moore's P. C. 378), *Les Sœurs Hospitalières de St. Joseph* v. *Middlemiss* (3 App. Cas. 1102) approved.—Consequently the French law introduced into *Canada* by the Edict of 1663 remained unaffected by the Ordinance; and it was not proved and could not be presumed that such law became altered or modified in consequence of the jurisprudence of the province having adopted the rules contained in the Ordinance. Symes *v.* Cuvillier - 138

2. —— *Election Petitions — British North America Act*, 1867, *s.* 92, *sub-s.* 14 — *Canada Statute*, 37 *Vict. c.* 10—*Distribution of Legislative Power—Jurisdiction of Superior Court.*] The *Dominion Controverted Elections Act* of 1874 (Canadian Statute, 37 Vict. c. 10) does not contravene sect. 92, sub-sect. 14 of the *British North America Act*, 1867.—The said sub-section does not relate to election petitions, while sect. 41 of the same Act reserved to the Parliament of *Canada* the power of creating a jurisdiction to determine them.—The Parliament of *Canada* has power to commit such jurisdiction to existing Provincial Courts.—Special leave refused to appeal from two concurrent judgments of the Courts in *Canada* affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched. Valin *v.* Langlois - - 115

3. —— *Railway Act*, 1868—*Validity of Award —Compensation — Invalid Transfer by Railway* **CANADA, LAW OF**—*continued.*

Company—Quebec Act, 39 *Vict. c.* 2—*Power of Provincial Legislature.*] *Held*, that an award made under "*The Railway Act*, 1868," awarding to the Respondent railway company as damages for expropriated land "the sum of $35,013 *plus* $100 per month from this date, payable on the first of each month until the said company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land and constructed a culvert to protect the said watercourse," is invalid upon the face of it, in respect of the monthly payment directed, which is not rent, but in the nature of an assessment of damages payable *in futuro*, contingent on a future event and therefore uncertain; and also in respect of the direction to construct a culvert, which was not within the functions of the arbitrators.—Under the Act it is not competent to the arbitrators to impose the payment of a rent or periodical sum at all. Their duty is, except when the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," to fix as compensation such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under sub-sect. 27, or into Court under sub-sect. 34 of sect. 9 of the Act, in order to entitle the company to possession under the 27th, or to confirmation of title under the 34th and 35th sub-sections.—By a deed (16th of November, 1875) the Respondent company, which had been originally incorporated under *Quebec Act* 32 Vict. c. 55, but which was subsequently declared a federal railway by *Canadian Act* 36 Vict. c. 82, and became subject to *Canadian Railway Act*, 1868, purported to tranfer such federal railway with all its appurtenances and all its property, liabilities, rights, and powers to the *Quebec* Government, and agreed to dissolve itself as soon as such transfer should be perfected.—By *Quebec Act* 39 Vict. c. 2, such transfer was confirmed, the enterprise of the Respondent company was combined with that of another company which had made a similar transfer to the Government, the Respondent company was dissolved, and its property vested in a new company with a new title and a different organization, which was thereby declared to be subject to provincial legislation:—*Held*, that both the deed and the enactment 39 Vict. c. 2, were invalid, and inoperative to affect the obligations of the company.—Such a transfer is *ultrà vires* a railway company, by the law of the province of *Quebec* as defined by Art. 369 of the Civil Code; and by the special legislation affecting the Respondent company, read in connection with the *British North America Act*, 1867, sect. 91 and sect. 92. sub-sect. 10, the same could not be validated to all intents and purposes by an Act of the provincial legislature. An Act of the Parliament of *Canada* was essential in order to give to such transfer full force and effect; whatever may have been the inchoate rights created thereby as between the parties thereto. Bourgoin *v.* La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental - - - - - 381

4. —— *Real Servitude—Civil Code, Arts.* 499, 553, 554—*Obligation to allow and repair a Road—*

CANADA, LAW OF—*continued.*

Prescription.] By a seignorial deed executed in 1804, certain land was granted to *S.* subject to the obligation that part of it was to be used for a road which the grantee was to make and keep in repair, the grantors being primarily liable to the municipal authorities in respect of such repair.—The same land passed in 1862 to the Appellant by a sheriff's sale made under a decree against the then proprietors.—In an action *en garantie* brought by the grantors of the land against the Appellant to compel him to indemnify them in respect of their statutory liability to repair the said road :—*Held*, that such obligation created a real servitude within the meaning of Art. 499 of the *Civil Code*, and consequently that the sheriff's sale, whether or not it included the road, did not discharge the land from such servitude.—*Held*, further, that the obligation to repair not being separable from the obligation to allow the land to be used as a road, the servitude created thereby could not be prescribed against under Art. 2251 of the Code by non-repair for ten years. The land having been constantly used as a road, the Appellant had not had effective possession thereof for ten years against such servitude. Dorion *v.* Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal - - - - 362

5. —— *River—French Law in Quebec—Riparian Proprietors—Droit d'accès et de sortie—Navigable Rivers—Obstruction to Navigation—Damage.*] In an action for damages and to obtain the demolition of a bridge constructed by the Corporation of *Quebec* across the Little River *St. Charles*, on the ground that the bridge obstructed the navigation of the river and thereby caused damage to the Plaintiff as the owner of riparian land; it appeared that another bridge existed a short distance higher up the river, that the river was tidal beyond the higher bridge, and navigable for boats, flats, and rafts, and that it was possible at exceptionally high tides to float barges as far as the higher bridge, but that the difficulties and risks which from natural causes attended the navigation of craft of this description was so great that the river in its present state did not admit of their use in a practical and profitable manner; that the small boats, flats, and rafts, could be navigated as before, unobstructed by the bridge, although masted barges could not pass it without lowering their masts; that the Plaintiff's land was situated between the two bridges and was used as a farm, but was not proved to have been depreciated in value by reason of the bridge complained of, and that the Plaintiff was not proved to have sustained damage from actual interruption of traffic.—*Held*, that although there may be "*droit d'accès et de sortie*," belonging, according to French law as it prevails in *Quebec*, to riparian land as to a house in a street which, if interfered with, would at once give the proprietor a right of action; yet this right is confined to what it is expressed to be, "*accès*," or the power of getting from the water-way to and upon the land (and the converse) in a free and uninterrupted manner; that such right had not on the evidence been violated; and that supposing the bridge complained of to cause some obstruction to the navigation, the action could not be maintained in respect of it without proof of actual and special damage.—*Lyon* v. *Fishmongers' Company* (1 App. Cas. 662) considered.—Whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage, which is a private right by English as by French law, is a question of fact to be determined by the circumstances of each particular case.—According to French law the test of the navigability of a river is its possible use for transport in some practical and profitable manner. Bell *v.* Corporation of Quebec - - - - - 84

6. —— *Sale—Delivery—Possession—Civil Code, Art.* 1472] Assuming the Canadian law to be (notwithstanding arts. 1472, 1025, and 1027 of the *Canadian Civil Code*) that the property in a thing sold passes by a genuine contract of sale without delivery even as against third persons, *held*, on the evidence in this case, that the *indicia* of a *bonâ fide* sale were wanting, and that the circumstance of there having been no change of possession of the thing alleged to have been sold was one of the material facts to shew that the sale was simulated. Cushing *v.* Dupuy - 409

7. —— *Practice—Appeal—Canadian Code of Civil Procedure, Arts.* 1178, 798, *and* 801—*Interlocutory Judgment.*] It is not competent to the Court of Queen's Bench for *Lower Canada* to grant leave to appeal to Her Majesty in Council from an interlocutory order, unless specially authorized so to do by the *Code of Civil Procedure*.—A judgment of the Court of Queen's Bench affirming a judgment of the superior Court, which rejected the Appellant's petition that a certain writ of *capias ad respondendum* issued against him under Arts. 798 and 801 of the *Code of Civil Procedure* might be set aside, is not a final judgment within the meaning of Art. 1178. Goldring *v.* La Banque D'Hochelaga . - 371

8. —— *Practice—Appeal—Prerogative of the Crown to admit Appeals—Powers of Dominion and Provincial Legislatures—British North America Act*, 1867, *ss.* 91, 92—*Canadian Act*, 40 *Vict. c.* 41, *s.* 28—"*Final.*"] The *British North America Act*, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer and did confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as these latter might be affected by a general law relating to those subjects. Consequently the Dominion enactment, 40 Vict. c. 41, s. 28, amending the *Canadian Insolvent Act*, and providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i.e.*, not subject to the appeal as of right to Her Majesty in Council allowed by the *Civil Procedure Code*, art. 1178, is within the competence of the Canadian Parliament, and does not infringe the exclusive powers given to the Provincial Legislature by sect. 92 of the Imperial statute. Neither does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.—The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty; but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, there-

CANADA, LAW OF—*continued.*
fore, does not interfere with the prerogative of the Crown; and *quære*, what powers may be possessed by the Parliament of *Canada* so to do.—*Cuvillier* v. *Aylwin* (2 Knapp's P. C. 72) reviewed. Cushing *v.* Dupuy - - - - - 409

9. —— *Practice—New Trial—Damages—Misdirection—Negligence—Civil Procedure Code, s.* 426, *sub-s.* 11.] Where a Plaintiff had obtained against a railway company a verdict with damages, sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the Court of Queen's Bench on the ground alone of excessive damages, the finding as to negligence by the Defendant company being approved by two Courts:—*Held*, that inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to shew that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial. Lambkin *v.* South-Eastern Railway Company - - - - 352

—— Principal and Agent—Factor - 664
See Principal and Agent.

CAPE COLONY ACT, No. 6, of 1864 - 842
See Griqualand, Law of.

CAPITAL—Annuity—Capital or income - 588
See Will. 1.

CARGO—Discharge of—Charterparty - 599
See Ship. 1.

CASES—*Ashbury Railway Company* v. *Riche* (Law Rep. 7 H. L. 63) observed upon - 473
See Railway.

—— *Attwood* v. *Small* (5 Cl. & F. 232) observed upon - - - - 161
See Bankruptcy.

—— *Campbell* v. *Campbell* (Moor. 14,855; 1 Pat. App. 343) not reconcilable with *Leitch* v. *Leitch* (3 W. & S. 366) - - 787
See Scotch Law. 4.

—— *Cuvillier* v. *Aylwin* (2 Knapp, P. C. 72) reviewed - - - - 409
See Canada, Law of. 6.

—— *Denyssen* v. *Mostert* (Law Rep. 4 P. C. 236) affirmed - - - - 123
See Ceylon, Law of.

—— *Diggle* v. *Higgs* (2 Ex. D. 422) approved 342
See New South Wales, Law of. 3.

—— *Ditcher* v. *Denison* (4 Q. B. D. at p. 273) explained - - - - 214
See Ecclesiastical Law.

—— *Don* v. *Watt* (16 F. C. 647) disapproved 754
See Scotch Law. 1.

—— *Ferrier's Trustees* v. *Bailey* (4 Court of Sess. Cas. (4th Series) 748) approved - 44
See Scotch Law. 5.

—— *Hale* v. *Hale* (3 Ch. D. 643) approved 714
See Will. 2.

—— *Holdsworth* v. *Wilson* (4 B. & S. 1) approved - - - - 425
See Lands Clauses Act. 1.

CASES—*continued.*
—— *Hutchinson* v. *Gillespie* (4 Moore's P. C. 378) approved - - - - 138
See Canada, Law of. 1.

—— *Jegon* v. *Vivian* (Law Rep. 6 Ch. 742) followed) - - - - 25
See Mine.

—— *Leitch* v. *Leitch* (3 W. & S. 366) considered) - - - - 787
See Scotch Law. 4.

—— *Les Sœurs Dames Hospitalières* v. *Middlemiss* (3 App. Cas. 1102) approved - 138
See Canada, Law of. 1.

—— *Lyon* v. *Fishmongers' Company* (1 App. Cas. 662) considered - - - 84
See Canada, Law of. 5.

—— *Maccabe* v. *Hussey* (2 Dow. & Cl. 440) observed upon - - - 161
See Bankruptcy.

—— *Macdonald* v. *Union Bank of Scotland* (Court Sess. Cas. 3rd Series, vol. ii., p. 963) approved - - - - 754
See Scotch Law. 1.

—— *Matthews* v. *Bloxsome* (33 L. J. (Q. B.) 200) doubted - - - - 754
See Scotch Law. 1.

—— *May* v. *Bennett* (1 Russ. 370) adopted 588
See Will. 1.

—— *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) followed - - - - 317
See Scotch Law. 2.

—— *Reg.* v. *Tithe Commissioners* (11 Q. B. 459) explained - - - - 214
See Ecclesiastical Law.

—— *Ricardo Schmidt, The* (Law Rep. 1 P. C. 268; S. C. 4 Moore, P. C. 121) approved - - - - 548
See Slave Trade.

—— *Rossmore's Trustees* v *Brownlie* (5 Court of Sess. Cas. (4th Series) 201) approved
See Scotch Law. 5. [44

—— *Seale* v *Barter* (2 B. & P. 485) approved
See Will. 3. [447

—— *Selkrig* v. *Davies* (2 Dow. 230; 2 Rose, 97, 291) followed - - - 161
See Bankruptcy.

—— *Smith* v. *Great Western Railway Company* (3 App. Cas. 182) *dictum* questioned 820
See Scotch Law. 9.

—— *Tennant* v. *City of Glasgow Bank* (4 App. Cas. 615) followed - - - 317
See Scotch Law. 2.

—— *Thoms* v. *Thoms* (Court Sess. Cas. vol. vi., 704) approved - - - 787
See Scotch Law. 4.

—— *Wild's Case* (6 Co. Rep. 17) followed 447
See Will. 3.

—— *Wilson, Ex parte* (Law Rep. 7 Ch. 490) approved - - - - 161
See Bankruptcy.

—— *Wright* v. *Callander* (2 De G. & M. 652) adopted - - - - 588
See Will. 1.

CEYLON, LAW OF—*Roman-Dutch Law—Mutual Will—Construction—Gift to a Class—Gift to*

CEYLON, LAW OF—*continued.*
Husband and Wife and another.] A mutual will is by Roman-Dutch law in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property.—*Denyssen* v. *Mostert* (Law Rep. 4 P. C. 236) approved.—Where *A.* and his wife *C.* (who survived him) by "mutual will" appointed their daughter, her husband, and her then existing child (the Plaintiff), and also the other children "which may hereafter be procreated" by their daughter, to be the sole heirs of all the joint estate of *A.* and *C.* which should be left at the death of the first deceased of them, to be divided according to law amongst their daughter, her husband, and her child, as also by the children which may be hereafter procreated by their daughter; and it appeared that no such children came into existence until after the death of *A.* and *C.*:—*Held*, that, on the due construction of the mutual will, *A.*'s intention was to divide his property (which he treated, moveable and immoveable, as one *corpus*) amongst the class of persons whom he had instituted his sole heirs, and that the distribution should take place when his will would become operative according to the ordinary rule of law. The words "which may be born between the date of his will and his death.—*Held*, further, that the daughter and her husband took, contrary to the English rule of construction, each a share, *i.e.*, each a third of *A.*'s estate instead of the moiety thereof between them, Roman-Dutch law assuming husband and wife for most purposes to be two separate persons. —*Held*, further, that although the son-in-law took a third share of *A.*'s estate on *A.*'s death, yet as he died before *C.* his share of *C.*'s property lapsed into the residue, which on her death the daughter and the Plaintiff were entitled to divide equally between them. Dias *v.* de Livera - 123

CHAMBERS—Order made in vacation—Time for appeal - - - - 685
See Practice. 2.

CHARTERPARTY - - - - 599
See Ship. 1.

CHEMIST AND DRUGGIST—Corporation acting as—Penalties - - - 857
See Pharmacy Act.

CHURCH DISCIPLINE ACT - - - 214
See Ecclesiastical Law.

CIVIL CODE (CANADA) arts. 499, 553, 554 - 362
See Canada, Law of. 4.

—— art. 1472 - - - - 409
See Canada, Law of. 6.

CIVIL PROCEDURE CODE (CANADA), art. 426, sub-s. 11 - - - 352
See Canada, Law of. 9.

—— arts. 798, 801, 1178 - - - 371
See Canada, Law of. 7.

CLASS—Bequest to - - - - 714
See Will. 2.

—— Gift to—Roman-Dutch law - - 123
See Ceylon, Law of.

COAL MINE—Worked beyond boundary—Compensation - - - - 25
See Mine.

COLLATERAL OBLIGATION—Bill of exchange—Scotch law - - 754
See Scotch Law. 1.

COLLISION - - - - - 876
See Ship. 2.

COLONIAL GOVERNOR—Authority of - 102
See Jamaica, Law of.

COLONIAL LAW—*Ceylon* - - - 123
See Ceylon, Law of.

—— *Griqualand* - - - - 842
See Griqualand, Law of.

—— *Jamaica* - - - - - 102
See Jamaica, Law of.

—— *Jersey* - - - - - 346
See Jersey, Law of.

—— *Lower Canada*
See Cases under Lower Canada, Law of.

—— *New South Wales* - - 63, 342, 374
See New South Wales, Law of. 1, 2, 3.

—— *New Zealand* - - - - 70
See New Zealand, Law of.

COMPANY—Debentures—Failure of undertaking
See Failure of Consideration. [176

—— False representations by directors—Action against liquidators - - - 317
See Scotch Law. 2.

COMPENSATION—Lands Clauses Act - 425
See Lands Clauses Act. 1.

—— Mining operations - - - 25
See Mine.

CONCESSION—Grant by foreign Government—Revocation - - - 176
See Failure of Consideration.

CONDITION—*Condition Precedent.*] *F.* who was about to employ *M.* in a situation of trust and confidence, effected a policy with a Guarantie Company to secure himself against fraud by embezzlement of money by *M.* The policy, which was for £1000, declared that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the company undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give notice of the claim, and proofs were to be given such as the directors for the time being might require. Then followed this proviso: "Provided that the employer shall if, and when, required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement, by the employed, or by his estate, of any moneys which the company shall have become liable to pay." *F.* claimed under this policy a sum of money alleged to have been lost by *M.*'s embezzlement. The directors pleaded that they had required *F.* to prosecute *M.*, but that *F.* had

CONDITION—*continued.*
not done so. Demurrer, because it did not appear that there was any obligation for *F.* to prosecute *M.*, or that the non-performance of any such obligation was a condition precedent to *F.*'s right to recover.—*Held*, reversing the judgment of the Court below (Lord *Selborne*, L.C. *diss.*), that the proviso did constitute a condition precedent, and furnished a defence to the action. London Guarantie Company *v.* Fearnley - 911

CONDITIONS OF SALE—Scotch law—Concealment - - - - - 925
See Scotch Law. 3.

CONSIDERATION—Failure of - - 176
See Failure of Consideration.

CONSTANTINOPLE—Consular Court—Procedure
See Consular Court. [564

CONSULAR COURT—*Consular Court of Constantinople—Procedure.*] In a suit in the Consular Court of *Turkey* brought by the Respondent against the wife of the Appellant, for a sale of a piece of land in *Prinkipo*, with the mill and bakery erected thereon, and for the payment of three-fourths of the proceeds of such sale into Court; it appeared—(1) That the Respondent was trustee in liquidation in respect of three-fourths share only in the beneficial interest in the said property, which share was subject to a mortgage; the Appellant, who was no party to the suit, being entitled to the remaining one-fourth share unincumbered:—(2) That the Defendant, having been originally a Turkish subject, had been made ostensible owner and trustee of the said property, in order to satisfy or evade the law of *Turkey*; but had thereafter by her marriage with the Appellant become a British subject—The Court thereupon ordered, with costs against the Defendant, on the 18th of July, 1874, that the whole of the property should be sold, and the whole of the proceeds paid into Court. In 1876, however, the Respondent sold the three-fourths share thereof to *C.*, as agent of the mortgagee by private contract, and received the purchase-money thereof.—On the 27th of March and 13th of June, 1878, the Court granted *ex parte* applications of the Respondent that the Defendant be ejected from the whole of the said property, with costs, and that the mill be closed. This was done and the seals of the Court put upon it.—On the 17th and 28th of June, 1878, the Court refused applications by the Appellant first for a rule nisi to set aside the said orders, on the ground that he was owner of one-fourth share of the mill and sole owner of two ovens attached to the mill; that *C.* had paid for and obtained possession of his three-fourths share; and that the Respondent had ceased to have any interest in the said property. Second, for leave to appeal to Her Majesty in Council against the the order of the 17th of June.—Thereafter by a series of orders the Court refused to set free the moveable property so placed under seal at the mill, or to set free the said two ovens, refused to the Appellant a rule nisi to that effect, and refused to suspend the proceedings and re-open the mill and ovens until security for damage be given, in the latter case directing the Defendant, who was no party to the application, to pay the costs. A further order *ex parte* on the application of

CONSULAR COURT—*continued.*
the Respondent was made that exclusive possession of the mill, bakery, and ovens be given to *C.*, and that the Defendant remove certain moveable property on filing an affidavit that the same belodged to her and her husband, and that he consented to such removal; in default whereof the Court, in the first instance, ordered that the same should be sold, but subsequently discharged this order on the application of the Respondent, and substituted for it an order that the Respondent should be at liberty to remove the moveable property not belonging to him, and the Defendant pay the costs:—*Held*, that the Appellant had unquestionably suffered grievous wrong by reason of these irregular proceedings made in a suit to which he was no party. The Defendant could not be sued as trustee without joining her husband, and was not the representative of her husband *quoad* his beneficial interest in the property. The Court could not compel a sale nor put a purchaser into possession of more than the three-fourth's share (subject to the mortgage), which was vested in the Respondent.—Having regard to the power of the Turkish authorities over the land, and to the fact that *C.* was not subject to the jurisdiction of the Consular Court, no order could be made directing restoration of possession or decreeing damages, but the orders appealed against were declared to have been irregularly and improperly made, and were set aside with costs. Pitts *v.* La Fontaine - - 564

CONVEYANCE—Disposition *mortis causâ* - 787
See Scotch Law. 4.

—— Scotch law—Clause of warrandice - 925
See Scotch Law. 3.

CORPORATION—Acting as chemist and druggist
See Pharmacy Act. [857

COSTS - - - - - - - 176
See Failure of Consideration.

—— Appeal for - - - - 582
See Practice. 1.

—— Arbitration under Lands Clauses Act 425
See Lands Clauses Act. 1.

CROWN—Prerogative to admit appeals - 409
See Canada, Law of. 8.

CROWN LANDS—Measurement of—*New South Wales* - - - - - 63
See South Wales, Law of. 1.

—— Purchase of—*New Zealand* - - 70
See New Zealand, Law of.

CURATELLE—Law of *Jersey* - - 346
See Jersey, Law of.

DAMAGE—Measure of—Mining operations 25
See Mine.

DEAN—Living held in right of deanery—Statute of Limitations - - - 736
See Limitations, Statute of.

DEBENTURES—Failure of undertaking - 176
See Failure of Consideration.

DIRECTORS—False representations by—Action against liquidator - - - 317
See Scotch Law. 2.

DISPOSITION—*Mortis causâ*—Scotch law 787
See Scotch Law. 4.

DOUBLE PROOF—Bankruptcy—Foreign bankruptcy - - - - 161
See Bankruptcy.

DROIT D'ACCÈS ET DE SORTIE - - 84
See Canada, Law of. 5.

ECCLESIASTICAL COMMISSIONERS - 736
See Limitations, Statute of.

ECCLESIASTICAL LAW—*Church Discipline Act—Discretionary Power of Bishop—"It shall be lawful."*] The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.—But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it.—The 3rd section of the *Church Discipline Act* (3 & 4 Vict. c. 86), provides that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report:—*Held*, that this section gave the bishop complete discretion to issue or decline to issue such commission.—The Act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions therefore may be construed independently of the practice under the previously existing law.—*Per* Lord *Blackburn*: There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application, which in this case he has performed.—Enabling words are always compulsory where they are words to effectuate a legal right.—*Reg.* v. *The Tithe Commissioners* (14 Q. B. D. 459–474) and *Ditcher* v. *Denison* (4 Q. B. D. at p. 273) commented on, and explained. Julius *v.* Bishop of Oxford - - - - - 214

ELECTION PETITION—Law of *Lower Canada*
See Canada, Law of. 2. [115

ENTAIL—*Scotland* - - - - 519
See Scotch Law. 7.

ENTRY—Implied—Scotch Law—Infeftment 44
See Scotch Law. 5.

ESTATE TAIL—Rule in *Wild's Case* - 447
See Will. 3.

EVIDENCE—*Public Document—Statements in.*] The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the Government, is not necessarily admissible in the Courts here, as evidence of all the facts stated therein. *M.*, the consul in *London* for the then Genoese Government, applied in 1789 to his Government to receive the rank and employment of diplomatic agent here. The Executive Government (*Collegii*) referred the application to a committee called the *Giunta della Marina* to inquire into the propriety of the proposed change of appointment, and into *M.'s* fitness for the post of diplomatic agent. The *Giunta* reported favourably on both points. In the course of the report the *Giunta* described him as "a native of *Quarto* of about forty-five years of age." He was appointed in 1790, and died in *England* in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but on a process instituted here, a decree was made directing payment of the fund to certain persons of the *Freccia* family, who claimed to be next of kin, and whose claim was founded on an allegation that *M.* had been born at *St. Ilario* near *Genoa* in 1735. Other persons then claimed to be next of kin, asserting that *M* had been born at *Quarto* in 1744. In a suit between these two sets of claimants the report of the *Giunta* was tendered in evidence as fixing the real place and time of *M's* birth:—*Held*, that it was not admissible for that purpose.—*Per* Lord *Blackburn*: "A public document" means a document that is made for the purpose of the public making use of it—especially where there is a judicial or *quasi*-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it. Sturla *v.* Freccia - - - - - 623

—— Intention—Disposition *mortis causâ* 787
See Scotch Law. 4.

—— *Prima facie*—Slave trading - - 548
See Slave Trade.

EXPECTANCY OR INTEREST—Scotch entail
See Scotch Law. 7. [519

FACTOR'S ACT - - - - 664
See Principal and Agent.

FAILURE OF CONSIDERATION—*Loan—Foreign Government—Revocation of a Concession—Trustees—Costs.*] Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands. Where there is a right dependent on the practicability of doing a certain work, the question of its practicability is not to be determined solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered. Thus, where a loan was raised to make a railroad in a foreign country, such loan being raised on the faith of a prospectus which set forth, as a security to the bondholders, the grant of a concession by the foreign Government, in virtue of which the bondholders would have the benefit of the customs duties imposed by that Government on goods passing along that railroad, and the foreign Government, finding the railroad not made,

FAILURE OF CONSIDERATION—*continued.*
revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions. A foreign Government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The Government afterwards revoked the concession:—*Held*, that its right to do so could not be questioned in any legal proceedings in this country.—Directions as to the form of the decree and as to costs. National Bolivian Navigation Co. *v.* Wilson - - - 176

FALSE REPRESENTATIONS—Conditions of sale —Scotch law - - - 925
See Scotch Law. 3.

—— Directors of company - - - 317
See Scotch Law. 2.

FISHERY—Salmon fishing - - - 273
See Scotch Law. 6.

FOREIGN BANKRUPTCY—Proof - - 161
See Bankruptcy.

FOREIGN GOVERNMENT—Concession—Revocation - - - - - 176
See Failure of Consideration.

FOREIGN STATE—Consular Court - 564
See Consular Court.

FRAUD—Allegation of - - - 685
See Practice. 2.

FRESH EVIDENCE—Practice - - 161
See Bankruptcy.

GAMING—Wagering contract - - 342
See New South Wales, Law of. 1.

GENERAL WORDS—Disposition *mortis causâ*
See Scotch Law. 4. [787

GIFT—Revocation—Law of *Lower Canada* 138
See Canada, Law of. 1.

GOVERNOR OF COLONY—Authority - 102
See Jamaica, Law of.

GRIQUALAND, LAW OF — *Construction — Cape Colony Act, No. 6 of 1864—Bank Notes.*] The intention to impose a charge upon the subject must be shewn by clear and unambiguous language. Where by an Act of the *Cape Colony* (No. 6, 1864), "for imposing a duty upon bank notes," which Act was assumed to have been validly extended to the province of *Griqualand West*, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that Act; it was *held*, that the Appellant Bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province, was not liable, according to the true construction of the Act, to make any return to the Respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch. Although by sect. 10 of the Act banks of issue liable to make the return prescribed by the Act, must include within such return such notes also as they have put into circulation, yet banks which, not issuing any notes purporting to be locally issued, and therefore not liable to make a return, put into circulation within the province their own notes, issued elsewhere, are not in respect thereof liable to the duty imposed by the Act. Oriental Bank Corporation *v.* Wright - - 842

GUARANTEE — Policy of—Guarantee company —Condition that employer should prosecute - - - - 911
See Condition.

HEIR—Substitute—Scotch entail - - 519
See Scotch Law. 7.

HYPOTHECATION - - - - 664
See Principal and Agent.

INCOME—Annuity—Capital or income - 588
See Will. 1.

INDORSEMENT—Bill of exchange—Scotch law
See Scotch Law. 1. [754

INTEMPERANCE—Law of *Jersey* - - 346
See Jersey, Law of.

JAMAICA, LAW OF—*Acts of State—Authority of Governor — Jurisdiction — Privilege — Pleading.*] Trespass for seizing and detaining at *Kingston* in *Jamaica* a schooner of which the Plaintiff was charterer, and which had, as alleged, put into the port of *Kingston* in distress and for repairs.—Plea in substance of privilege and to the jurisdiction, that the Defendant was Captain-General and Governor-in-Chief of the Island of *Jamaica*, that the acts complained of were done by him as Governor of the island and in the exercise of his reasonable discretion as such, and as acts of state.—The plea did not aver even generally that the seizure of the Plaintiff's ship was an act which the Defendant was empowered to do as Governor, nor even that it was an act of state:—*Held*, that the judgment *respondeat ouster* was right and must be affirmed. —The Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of Municipal Courts to determine whether any act of power done by a Governor is within the limits of his authority and therefore an act of state.—*Quære*, how far a Governor when acting within the limits of his authority, but mistakenly, is protected. Musgrave *v.* Pulido - - - - 102

JERSEY, LAW OF — *Curatelle — Person — Property.*] By the law of *Jersey* in order to place a man under "*curatelle*" the Court must be satisfied not merely that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. To establish the intemperance the Court must not merely have the evidence of relatives (*les électeurs*), but the presentment after examination of *les six principaux*. A similar procedure is adopted for the removal of the interdiction and

JERSEY, LAW OF—*continued.*
the re-instatement of the party in his civil rights. —When the Court is satisfied that the interdiction should be reversed as regards the person, it has no power to continue the "*curatelle*" as regards the property upon a mere suggestion that it would be better and more expedient for the family so to do. *Ex parte* Nicolle - - 346

JUDGE—Discretion—Appeal from - - 685
See Practice. 2.

JUDGMENT — Interlocutory appeal — *Lower Canada* - - - 371
See Canada, Law of. 7.

JURISDICTION—Governor of colony - 102
See Jamaica, Law of.

LANDS CLAUSES ACT — *Arbitration — Costs, Action for, before Taxation—Special Act.*] The *Lands Clauses Consolidation Act*, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special Act (38 & 39 Vict. c. ccviii.) declared that the provisions of the general Act were, "except where expressly varied by the special Act," incorporated with it. The general Act provided the forms of proceedings in arbitrations —such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators, and declared that compensation might be recovered with costs. The special Act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special Act. The arbitrator awarded compensation, but said nothing as to costs:—*Held*, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs:—*Held*, also, that the right to costs was entirely independent of the taxation of them, and an action could be maintained for the costs though the amount of such costs had not been previously settled or ascertained by taxation; and consequently an order for the taxation made by the learned Judge on giving his judgment for the Plaintiff, was a valid order. — *Holdsworth* v. *Wilson* (4 B. & S. 1) approved.—*Per* Lord *Selborne*, L.C.: In construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice and the universal analogy of such provisions in similar Acts of Parliament, ought to have much weight and force. Metropolitan District Railway Company *v.* Sharpe - 425

2. —— *Railway — Superfluous Land — Onus of Proof — Presumption.*] A railway company purchased, by private agreement, without any preliminary notice to treat, certain lands, in

LANDS CLAUSES ACT—*continued.*
amount nineteen acres, under which were mines of iron ore. These mines were specifically conveyed to the company. By the private Act incorporating the company the railway was to be finished in 1851. By warrant of the Railway Commissioners that time was extended to 1853. The company had used six of the nineteen acres in railway works—on certain spots of the remaining thirteen acres a drain, a cesspool, and a passage for water supply had been constructed, but no buildings had been erected, nor rails laid down. The railway was finished, but at the expiration of ten years from 1853 no sale of the lands took place. In December, 1849, the company had let the lands to a tenant from year to year, and he used them for agricultural purposes. In August, 1871, the company let the lands (again under a tenancy from year to year) to an iron mining company under a license to work the iron ore. In each of these agreements the directors reserved the absolute right (in the case of the iron company upon twenty-eight days' notice), to re-enter on the lands, and in the lease to the iron company the mining was to be done subject to the approval of the railway company and of that company's engineer. In 1875 an action of ejectment was brought to recover the lands as lands which, under sect. 127 of the *Lands Clauses Act*, 8 & 9 Vict. c. 18, had vested in the Plaintiffs as "adjoining owners." There was a reference to a barrister to state a case for the opinion of the Court. The case set forth in one of the paragraphs, that since 1868 the railway traffic had much increased, and that the lands "had been, and still were, required for the purpose of constructing additional sidings upon them to accommodate the increased traffic," and gave reasons of business which had influenced the railway directors in not making these sidings. The Queen's Bench Division had held that under these circumstances the lands were not to be considered as "superfluous land" which became vested in the adjoining owner—and that decision was affirmed by the Court of Appeal:—*Held*, that the decisions of the Courts below must be affirmed.—In a case of this kind the burden of proving a title to the land, as superfluous land, lies upon the claimant. —The mere fact that the land has not been built upon is not conclusive—all the circumstances must be considered.—The fact that the lands were in the neighbourhood of a populous town was a circumstance to raise a presumption that the lands would be wanted on account of increased traffic on the railway.—And, *semble*, that the fact that they were so wanted in 1868 raised a reasonable presumption that in 1863 the want of them for railway purposes been had foreseen.—*Per* Earl *Cairns*, L.C.: If a railway company purchases land and the minerals under its surface, and the surface is not at that time wanted for the purposes of the railway, but afterwards becomes so, and can be used without requiring the support of the minerals, *quære* whether there is any authority which requires the company to sell the minerals apart from the land, or in default of such sale, vests them in the adjoining owner.—*Per* Lord *Hatherley*: Questions as to superflous lands have proceeded, at all times, upon the *bona fides* of the

LANDS CLAUSES ACT—*continued.*
transaction.—*Per* Lord *O'Hagan*: An actual present intention to employ the land for the purposes of the railway need not have been formed within the prescribed time, in order to prevent a forfeiture at the end of it. Hooper *v.* Bourne 1

LEAVE TO DEFEND - - - 685
See Practice. 2.

LEGISLATIVE POWER—Distribution of—*British North America* - - - 115
See Canada, Law of. 2.

LIMITATIONS, STATUTE OF.—*Ecclesiastical Commissioners—Limitations—3 & 4 Will. 4, c. 27—3 & 4 Vict. c. 113.*] An allotment under an Inclosure Act (described as 137 A) was made in respect of premises held by a person under lease from a dean, the property leased being that of the dean in right of his deanery. By the 29th section of 3 & 4 Will. 4, c. 27, a dean could recover possession of such land within the term of sixty years from the time when the right of action first accrued. By the 3 & 4 Vict. c. 113, deanery lands, after the death of any dean then in possession, passed to the Ecclesiastical Commissioners; and the 57th section of that statute declared that "the Ecclesiastical Commissioners shall for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all all rights, powers, and remedies at Law and in Equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery, &c., in respect of which such profits and emoluments, &c., respectively are, by or under the provisions of this Act, to be paid or accrue to and be vested in the said Commissioners." Renewals of the original leases had been made, but the allotment 137 A was never referred to in them. It had been in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, and it was, in that way, held adversely to him. The dean died in 1854, and the Commissioners then came into possession, under the statute, of the property of the deanery. In 1877 the Commissioners brought an action to recover the allotment:—*Held* (*diss.* Lord *Blackburn*), that under the words of the 57th section the Commissioners had the same time within which to enforce their claim to the property that the dean would have had under the 29th section of 3 & 4 Will. 4, c. 27. There is a legal continuity between the rights, powers, and remedies of the dean, and those of the Commissioners. His right of action was transferred to them by the statute, and was not barred by the mere fact of the transfer.—*Per* Lord *Blackburn*: There are no words in the 57th section of 3 & 4 Vict. c. 113, which, as to time, render the 29th section of 3 & 4 Will. 4, c. 27, applicable to the Commissioners. Ecclesiastical Commissioners *v.* Rowe - - - - - 736

LOCAL AUTHORITY—*Scotland* - - 489
See Scotch Law. 8.

LOTTERY—Benefit society - - - 685
See Practice. 2.

MEASURE OF DAMAGE—Mining operations 25
See Mine.

MINE—*Coal Mine worked by Mistake beyond Boundary—Compensation—Evidence of the Measure of Damage—Royalty—Surface Damage—Way-leave.*] *A.* was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When *A.* purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to *R.* and *C.* They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under *A.'s* acre and a half; and in doing so damaged the surface.—*A.* could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but to *R.* and *C.*; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent.—In a claim by *A.* for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:—*Held*, affirming the decision of the Court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by *R.* and *C.* for the surrounding coal field; therefore *A.* was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface.—*Held*, also, that as the question of "way-leave" was not argued before the First Division of the Court of Session, it could not be entertained in this House.—The principle of *Jegon* v. *Vivian* (Law Rep. 6 Ch. 742) sustained. Livingstone *v.* Rawyards Coal Company 25

—— Under railway—Scotch law - - 820
See Scotch Law. 9.

MINERALS—Under superfluous land of railway
See Lands Clauses Act. 2. [1

MISDIRECTION—Law of *Lower Canada* - 352
See Canada, Law of. 9.

MORTGAGE—Instalments—Penalty - 685
See Practice. 2.

MUTUAL WILL—Roman-Dutch law - 123
See Ceylon, Law of.

NAVIGATION—Obstruction to—Law of *Lower Canada* - - - - 84
See Canada, Law of. 5.

NEGLIGENCE—Law of *Lower Canada* - 352
See Canada, Law of. 9.

NEW SOUTH WALES, LAW OF—*Lands Act Amendment Act*, 1875, *s.* 31—*Construction.*] The proviso to sect. 31 of the *Lands Act Amendment Act*, 1875 (which regulates the application by a Crown lessee to purchase lands comprised within his lease), enacts:—"Provided also that no such

NEW SOUTH WALES, LAW OF—*continued.*
application to purchase as aforesaid shall be made for more than one square mile within each block of five miles square out of each lease, or a proportionate quantity out of any holding of less area":—*Held*, that according to the true construction thereof, a Crown lessee has a right of pre-emption of such square mile if it forms part of a block which is equivalent to an area of five miles square, *i.e.*, which contains an area of twenty-five square miles, irrespective of whether such block forms or contains a geometrical figure five miles square. Robertson *v.* Day - - - 63

2. —— *Practice—Pleading—Plea in Accord and Satisfaction—Demurrer.*] To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the Plaintiffs, it was pleaded that a certain agreement had been come to between Plaintiffs and Defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration:—*Held*, on demurrer, reversing the judgment of the Court below, that such plea was bad. It could not be assumed that an agreement, the Defendants' version of which was set out in the plea, had been accepted in accord and satisfaction. Barclay *v.* Bank of New South Wales - 374

3. —— *Wagering Contract—Right to recover Deposit from Stakeholder—*14 *Vict. No.* 9, *s.* 8—*Construction.*] The Plaintiff deposited with the Defendant £200 to abide the event of a match between a horse of the Plaintiff and another horse belonging to *G.*; but before the day fixed for the race, he gave notice to the Defendant that he revoked the authority to pay over the money, and demanded the return of it:—*Held*, that the Plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and therefore null and void under the Colonial Act, 14 Vict. No. 9, s. 8 (which is in the same terms as Imperial Act, 8 & 9 Vict. c. 109, s. 18). It was not an agreement to contribute a sum of money within the meaning of the proviso contained in the said section; which proviso applies to contributions other than wagers.—*Diggle* v. *Higgs* (2 Ex. D. 422) approved.—Where a colonial Legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in *England*, such construction should be adopted by the Courts of the Colony. Trimble *v.* Hill - - - - 342

NEW TRIAL—Law of *Lower Canada* - 352
See Canada, Law of. 9.

NEW ZEALAND, LAW OF—*Southland Waste Lands Acts of* 1865 *and* 1867 — *Construction — Rights of Purchaser — Jurisdiction of Commissioners.*] On the 25th of June, 1873, the Respondent applied to the Appellant Board for the purchase of a certain piece of land in terms of the *Southland Waste Lands Act* (29 Vict.), sect. 26, *i.e.*, at a price of £1 per acre.—On the 27th of June, the application was lodged, received and filed by the Board at a meeting.—On the 9th of July, the price was raised by an order of the

NEW ZEALAND, LAW OF—*continued.*
Governor in Council (in terms of the Act), from £1 to £3 per acre.—On the 1st of August, 1873, the application was granted, and subsequently the purchase-money, calculated at £1 per acre, was paid, and a certificate of receipt was granted.—On the 25th of May, 1876, the *M.* Appellants applied to the Board to purchase the same land, and on the Respondent opposing such application, the Board stated a case for the opinion of the Supreme Court, and determined, in accordance with such opinion, that the Respondent was not entitled to the land at less than £3 per acre, and that, he not having paid the same, the *M.* Appellants were entitled to have their application granted.—To a declaration in an action brought by the Respondent stating the above facts and praying for a declaration of title, injunction, and general relief, it was demurred (1) that it appeared that the Respondent was not entitled to be declared the purchaser; (2) that the action did not lie against the Board:—*Held*, that the demurrer cannot be maintained.—The Respondent's application must be construed as one to purchase at the price fixed by the Act at the date thereof, and not at any price to which it might thereafter be raised; the effect of the Board's decision was to grant the application in its entirety, *i.e.*, at £1 per acre; and there being then no other applicant, and no grounds for refusal as referred to in *Southland Waste Lands Amendment Act*, sect. 29, the Respondent had a right to have his application granted. Further, the decision of the Board on the application of the *M.* Appellants, after it had granted the Respondent's application, that, nevertheless, he was not entitled to the land was without jurisdiction, and therefore the Respondent was not put to his appeal under the Act, but had a right to maintain the action. Pearson *v.* Spence - - - - 70

NOTICE—Purchase of railway—Notice by owner to work out mines—Scotch law - 820
See Scotch Law. 9.

ORDINANCE OF 1731—Law of *Lower Canada*
See Canada, Law of. 1. [138

PARTITION SUIT—*Sale or Valuation*—31 *&* 32 *Vict. c.* 40, *ss.* 3, 5.] Owners of three sixteenths of a property sought to have a sale of it; owners of thirteen sixteenths of it objected to a sale and offered to purchase the shares of the others at a valuation. In the Court of the Vice-Chancellor a valuation was ordered under the provisions of the 5th section of the 31 & 32 Vict. c. 40. The Court of Appeal decided that the case fell under the 3rd section of that Act, that the 5th section did not qualify or control the 3rd, nor operate as a proviso upon it, and so the decision below was reversed, and a sale was directed:—*Held*, by Lord *Blackburn* and Lord *Watson* (Lord *Hatherley* dissenting), that the decision of the Court of Appeal was correct, and must be affirmed.—A party asking for a sale is not compellable to part with his share on a valuation. Pitt *v.* Jones - - 651

PENALTY—Mortgage bond—Instalments 685
See Practice. 2.
—— Pharmacy Act - - - - 857
See Pharmacy Act.

PERPETUITY - - - - - 714
See Will. 2.

PHARMACY ACT—"*Person*"—"*Corporation*"—*Statute*—31 & 32 *Vict. c.* 121.] Whether the word "person" in a statute can be treated as including a corporation must depend on a consideration of the object of the statute, and of the enactments passed with a view to carry that object into effect.—The 31 & 32 Vict. c. 121, was passed to protect the public against the sale by incompetent persons of poisonous drugs, and in the 1st section enacts "that it shall be unlawful for any person to sell, or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of chemist and druggist, &c., or pharmacist, &c., unless such person shall be a pharmaceutical chemist, &c., within the meaning of this Act, and be registered under this Act." By sect. 15, any person who shall offend in this respect (the words of sect. 1 being almost repeated) shall be liable to pay a penalty of £5, to be sued for as therein directed.—A small body of persons had obtained a registration under the *Companies Acts*, 1862–1867. One only of these persons was a qualified, certified, and registered chemist. His share in the company was very small: he was the person who appeared in the shop and conducted the sales, and he received a salary for his labour in dispensing the drugs, which were sold for the profit of the company:—*Held*, that, under these circumstances, the word "person" in the 1st and 15th sections of the statute did not apply so as to make this incorporated company liable to the penalty. But the actual seller must be a qualified person. Pharmaceutical Society *v.* London and Provincial Supply Association - - 857

PLEADING—Accord and satisfaction - 374
See New South Wales, Law of. 2.

—— Plea of privilege—Act of state - 102
See Jamaica, Law of.

PLEDGE - - - - - 664
See Principal and Agent.

PORTUGAL—Treaty with - - - 548
See Slave Trade.

POSSESSION—Immemorial - - 273
See Scotch Law. 6.

POWER OF APPOINTMENT—Construction of will - - - - - 447
See Will. 3.

PRACTICE—*Appeal for Costs.*] An appeal must not be brought for costs, or in relation to costs. But an appeal against an order which imposes, as a condition to having a new trial, the payment, within a certain time, of the costs of the first trial does not fall within that principle.—The competency of the appeal being established, the costs of the cause were reserved till the hearing of the case itself.—Suggestion as to printing the evidence where a point of law has, previously, to be considered. Metropolitan Asylum District *v.* Hill - - - - - - 582

2. —— *Rules of Court*, 1875, *Orders* xiv. *r.* 1*a*; liv. *r.* 6 — *Lottery* — *Penalty* — *Mortgage* — *Accounts.*] In a question arising on Orders and Rules made under the Judicature Acts in matters where Courts or Judges are to exercise a discretion, the House is unwilling to disturb the orders made, unless for strong substantial reasons; but the principle on which such orders ought to be made, may furnish those reasons.—By one of the General Orders of the *Judicature Act*, 1875, eight days only are given for an appeal to the Divisional Court against an order made by a Judge at Chambers:—*Held*, that that limitation of time does not affect the right to appeal against an order made in vacation at Chambers, when no Divisional Court would be sitting within the eight days. The time for appealing against such an order, ought, almost as a matter of course, to be enlarged.—Where an order had been made at Chambers and the eight days had, under such circumstances, expired without an appeal to the Divisional Court, the fact that an execution had in the meantime issued, makes no difference in the matter.—Where, in a claim for payment of sums of money, the defence set up is that of a denial and contradiction of the accounts on which the claim is founded, it is erroneous to make an order under Order xiv., rule 1a, refusing to a defendant the liberty to defend, except upon the condition that he must pay into Court a definite sum of money within a certain time, and that, unless he does so, judgment shall be signed against him. And this is especially the case where there are mortgages, and the creditor has been a mortgagee in possession.—An order at Chambers was made refusing leave to defend, except on terms, the time for performing which was allowed by the Defendant to expire, and another order at Chambers was afterwards made refusing leave to enlarge the time within which the first order might be contested. An appeal was then taken to the Divisional Court against the second order, when that Court desired that the notice of motion should be considered as amended so as to include the first order:—*Held*, that the two orders were thus brought fully before the Court, and the judgment then given must be taken as applicable to both of them.—For the same reason, in an appeal against that judgment, the Court of Appeal must be considered to have had both the orders brought under its revision, and on an appeal to this House both the orders and both the judgments were brought into discussion.—In a mortgage bond, given to secure the due payment, by instalments, of a sum due, a provision making the total sum due enforceable on any default, is not to be considered a penalty.—A society constituted (avowedly) for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts.—A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any Court ought to take notice.—Therefore, an account directed to be taken in this case, where such an allegation had been made, was directed to be taken without regard to this insufficient allegation of fraud.—The judgment and execution were ordered to stand as security.—General directions as to the mode of taking the account. Wallingford *v.* Mutual Society - - - - 685

—— Fresh evidence - - - - 161
See Bankruptcy.

PRACTICE—*continued.*
—— Law of *Lower Canada* - - - 352
See Canada, Law of. 9.
PREROGATIVE OF CROWN—Appeal - 409
See Canada, Law of. 8.
PRESCRIPTION—Law of *Lower Canada* - 362
See Canada, Law of. 4.
PRESUMPTION—Superfluous lands—Railway 1
See Lands Clauses Act. 2.
PRINCIPAL AND AGENT—*Factors Act—Canada Code—Agent—Hypothecation of Property of Real Owner.*] Where there is a power, by law, to sell, a purchaser may obtain, from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge.—*Barrow* was a leather merchant in *London*. *Bonnell* was a tanner in *Canada*. *Barrow* agreed to pay *Bonnell* 1½*d.* per pound for every hide tanned by *Bonnell* in the mode of the country, and *Bonnell* was to procure freight, and send back the hides. *Barrow* sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime *Bonnell* had obtained from the *Toronto Bank* bank advances, on his own account, on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, and the bankers (who had acted in entire ignorance of the transactions between *Barrow* and *Bonnell*) claimed to retain the bills of lading and the hides until their demands were satisfied:—*Held*, that, under the circumstances of the case, *Bonnell* could not, under any law, English or Canadian, claim to be a factor or agent of *Barrow* entitled to pledge *Barrow's* goods, and that, consequently, the bankers could not set up any title to the goods, as derived from him, against the real owners. City Bank *v.* Barrow - - - - - 664
PROOF—Bankruptcy—Double proof - 161
See Bankruptcy.
PROSECUTION — Embezzlement — Condition in policy of guarantee company - 911
See Condition.
PROVINCIAL LEGISLATURE—Power of 381,
See Canada, Law of. 3, 8. [409
PUBLIC DOCUMENT—Evidence - - 623
See Evidence.
PUBLIC HEALTH ACT—*Scotland* - - 489
See Scotch Law. 8.

RAILWAY — *Powers to contract—Ultrà Vires.*] The doctrine of *ultrà vires* as explained in *The Ashbury Railway Company* v. *Riche* (Law Rep. 7 H. L. 653) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as *ultrà vires*.—In an Act of this kind granting special powers, what is not permitted is prohibited.—*Per* Lord *Watson*: The test applied in the *Ashbury* case to the powers of a joint stock company (limited), registered under the *Companies Act*, 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament.—An Act of Parliament authorized
RAILWAY—*continued.*
a company to make a railway to *T.* and *S.* There were two other railway companies which were afterwards combined into one called the *Great Eastern Railway Company*. This latter company entered into a contract with the *T. and S. Company*, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the *Great Eastern Company*, and an injunction asked for to restrain it from executing this contract. One of the Acts relating to the two companies contained (cl. 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance, and management of the Extension railway [this was the *T. and S. Railway*], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the *Great Eastern*], and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this Act." The 15th clause of the Act was in these words, "The directors of the *T. and S. Company* and the directors of the two companies, respectively, may (subject to the sanction of the shareholders) enter into any contracts or agreements for effecting all or any of the purposes of this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto":—*Held*, that the contract of the *G. E. Company* to supply the *T. and S. Company* with rolling stock was not *ultrà vires*, but was warranted by the words of these sections of the Act. Attorney-General *v.* Great Eastern Railway Company - - - - 473
—— Compensation—Canadian Railway Act 381
See Canada, Law of. 3.
—— Scotch law—Mines under railway - 820
See Scotch Law. 9.
—— Superfluous lands—Onus of proof - 1
See Lands Clauses Act. 2.
REAL SERVITUDE—*Lower Canada* - 362
See Canada, Law of. 4.
REASONABLE SUSPICION - - - 548
See Slave Trade.
RES JUDICATA—Tiends - - - 249
See Scotch Law. 10.
REVENUE—Duty on bank notes—Law of *Griqualand* - - - - - 842
See Griqualand, Law of.
REMOTENESS - - - - 714
See Will. 2.
RIPARIAN OWNER—Law of *Lower Canada* 84
See Canada, Law of. 5.
RIVER—Law of *Lower Canada* - - 84
See Canada, Law of. 5.

ROAD—Obligation to repair—*Lower Canada* 362
See Canada, Law of. 4.
ROLLING STOCK—Hire of—*Ultrà vires* agreement - - - - 473
See Railway.
ROYALTY—Mine - - - - 25
See Mine.
RULE IN WILD'S CASE - - - 447
See Will. 3.
RULES OF COURT, 1875, Order XIV. r. 1a 685
See Practice. 2.
—— **Order LIV. r. 6** - - - 685
See Practice. 2.

SAILING RULES—Collision - - 876
See Ship. 2.
SALE—Partition suit - - - 651
See Partition Suit.
SALMON FISHING - - - - 273
See Scotch Law. 6.

SCOTCH LAW—*Bill of Exchange—Acceptance—Indorsement—Collateral Obligation—Statutes* 19 & 20 *Vict. c.* 60, *ss.* 6, 11; 19 & 20 *Vict. c.* 97, *s.* 6; *and* 41 *Vict. c.* 13, *s.* 1.] Sect. 11 of the *Mercantile Law Amendment* (*Scotland*) *Act*, 1856, is in the same terms with sect. 6 of the corresponding English Act: and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorized by him."—On the 2nd of March, 1878, in *Hindlaugh* v. *Blakey* (3 C. P. D. 136), it was held that an acceptance by the drawee was null in respect that there was no writing except the signature. On the 16th of April, 1878, was passed the *Bills of Exchange Act*, which, after reciting the above quoted section of the Mercantile Law Amendment Acts; and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not, and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill."—*A.* procured from *B.* an advance of £1000 on a bill of exchange at twelve months for *C.* and *D.*, his two sons. *B.* signed the bill as drawer, and addressing it to *C.* and *D.*, handed it to *A.*, who forwarded it to *C.* and *D.* They signed it as acceptors, and sent it back to *A.*, who wrote his own name across the back, and gave it to *B.* He then forwarded the amount to *C.* and *D.*—Subsequently *C.* and *D.* became bankrupt, and were unable to pay the amount of the bill. *A.* and *B.* being both dead, there was no exact evidence why *A.* put his name on the bill. *C.* and *D.* had previous to the date of the bill obtained money from *B.* on their own security. The trustees of *B.* claimed from *A.*'s representative the amount of the bill on the ground that *A.* indorsed the bill as "joint obligant" with *C.* and *D.*, "and as co-acceptor with them for payment of its contents": —*Held*, affirming the decision of the Court below, although not upon the same reasons, that *A.*'s representative was not liable, because that *A.* was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word; and that his liability, as insisted upon by *B.*'s trustees, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law merchant would infer from his mere signature as it appears on the back of the bill, could only be proved by a writing properly signed under, in *Scotland*, the 6th section of 19 & 20 Vict. c. 60; and in *England* the 29 Car. 2, c. 3, s. 4, which writing was here absent.—*Held*, also, that the Act of 1878 was in effect a declaration by the Legislature that the decision in the case of *Hindlaugh* v. *Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the *Scottish Act* between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded.—*Per* Lord *Watson*: The character in which *A.* did become a party to the bill was both in fact and law that of an indorser; and in determining his legal position, the fact that his indorsement was written before the bill was delivered to the drawer, and the money advanced by him, was quite immaterial.—The doctrine deduced from *Don* v. *Watt* (26 May, 1812, F. C. vol. xvi.; 647) and *Watters* (7 March, 1818, F. C. vol. xix.; 489), by Professor *Bell* in his Commentaries, vol. i. (7th ed.) p. 425, that in *Scotland* a signature as an acceptor by a person not a drawee "is held to import a joint undertaking as acceptor of the bill or maker of the note" not approved of; see Lord *Watson's* opinion at p. 779.—*Matthews* v. *Bloxsome*, 1864 (33 L. J. (Q.B.) 209) doubted as sound law.—*Macdonald* v. *Union Bank of Scotland* (Court Sess. Cas. 3rd Series, vol. ii. p. 963) approved. Steele *v.* M'Kinlay - - - - - 754

SCOTCH LAW—*continued.*

2. —— *Company — Action by Shareholder against the Company in Liquidation for Damage caused by Fraudulent Misrepresentations of Directors inducing him to purchase Shares.*] A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it: his *only* remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by the winding-up of the company or by any other means—his action for damages is irrevelant, and cannot be maintained.—*H.* bought from the *City of Glasgow Bank*, a co-partnership registered under the *Companies Act*, 1862, £4000 of its stock in February, 1877.—He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October, 1878, with immense liabilities: and *H.* was entered

SCOTCH LAW—*continued.*

on the list of contributories, and paid calls. In December, 1878, *H.* raised an action against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding-up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum*:—*Held*, affirming the decision of the Court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325), and *Tennent* v. *City of Glasgow Bank* (4 App. Cas. 615), they afforded no ground for an action against the liquidators; therefore the action was irrelevant. Houldsworth *v.* City of Glasgow Bank - 317

3. —— *Conveyance—Sales of Heritable Estate—General Clause of Warrandice—Collateral Representation—Concealment.*] Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. *A.* agrees by missives attached to the articles of roup to buy the estate, and a conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement: "The lands hold of the Crown," and in answer to an inquiry made before the sale on behalf of *A.* as to the nature of the holding, the seller's agents referred *A.* to the note of particulars, adding: "The proprietors" (*B. & C.*) "are not entered with the Crown, but you are aware the Crown never asks for an entry." The foundation for the belief that the lands were held direct of the Crown rested on a decree of tinsel, dated 1813, directed against the heir of line of the last superior, and a decree of forfeiture of the mid-superiority, dated 1849, followed by a Crown charter. From 1813 there had been no assertion of a contrary right.—Immediately before the sale the agents for *D.*, the disponee of the last superior, wrote to *B. & C.*'s agents claiming the right of mid-superiority, but this claim on its being disputed and not further persevered with, *B. & C.*'s agents did not intimate to *A.* Two years later *D.*'s agents renewed the claim, and ultimately raised an action against *A.*, claiming a year's rent as composition on his entry. *A.* was found liable, and the decree of forfeiture was reduced.—*A.* thereupon raised this action against *B. & C.* for repetition of the sum paid, the expenses of the litigation, and a sum equal to one and a half times the casualty of composition, on the ground, (1), of warrandice, and, (2), misrepresentation and concealment on the part of *B.*'s agents:—*Held*, affirming the decision of the Court below, that there had been no breach of warrandice; and that the representation was perfectly true according to the knowledge and belief of those who made it, and, that being so, any error therein was covered by the express contract of the purchaser to take the property with

SCOTCH LAW—*continued.*

the risks of errors in the particulars. Brownlie *v.* Campbell - - - - - 925

4. —— *Conveyance—Succession—Unqualified General Disposition—Admissibility of Extraneous Evidence—Evacuation of Special Destination in a Settlement having no Prohibitory Clauses.*] In the law of *Scotland*, general words of disposition in a *mortis causâ* deed, are, in the absence of any proof of a contrary intention, (and the law of *Scotland* allows such contrary intention to be proved by evidence of a kind which in *England* would not be admissible for that purpose,) sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs substitute.—*A.* was fee simple proprietor of the estates of *Kintarbert* and *Crossaig* in *Scotland*. He died leaving a disposition and settlement, without prohibitory clauses, disponing these lands to *B.* and his heirs male, whom failing, to *C.* and his heirs male, whom failing, to certain cousins in succession and their respective heirs male. *B.*, who owned other estates, took possession, and died leaving a *mortis causâ* deed, giving, in language entirely general, all his heritable and moveable property to *C.* and his heirs, whom failing, to his sister *D.*—*C.* entered into possession of all *B.*'s estates, and soon afterwards died intestate and without issue. The sister, *D.*, then, as heiress of provision under *B.*'s general *mortis causâ* deed, claimed the estate of *Kintarbert* and *Crossaig* as well as the other lands of *B.* *E.* disputed *D.*'s right, claiming these estates as heir of provision under *A.*'s settlement; contending that the general terms of *B.*'s deed could not be held to include *Kintarbert* and *Crossaig*, lands already settled upon a destination of heirs; nor was this *B.*'s intention:—*Held*, affirming the decision of the Court below, that *D.* was entitled, because *B.* was absolute fiar, being the heir in possession under a settlement or entail without fetters, and therefore a general disposition by him passed these lands as part of the *universitas* of his estate, there being nothing in the mere nature of such a special destination, as here, to prevent it; and no proof of any contrary intention to limit the operation of such general words.—*Thoms* v. *Thoms*, 1868 (Court Sess. Cas. 3rd Series, vol. vi. p. 704) held rightly decided.—*Campbell* v. *Campbell*, in this House, Feb. 17, 1743 (Morr. 14,855; 1 Pat. App. 343) not to be reconciled with *Leitch* v. *Leitch*, in this House in 1829 (3 W. & S. 366).—*Per* Lord *Selborne*, L.C.: If two cases in this House are not to be reconciled, the authority which is at once the more recent and the more consistent with general principles ought to prevail. Campbell *v.* Campbell - - - - - 787

5. —— *Conveyance—Superior and Vassal—Implied Entry—Conveyancing (Scotland) Act*, 1874, *s.* 4, *sub-s.* 2, *s.* 5—*Whether Trustees liable as Singular Successors.*] The *Conveyancing (Scotland) Act*, 1874 (37 & 38 Vict. c. 94), s. 4, enacts that every proprietor who at the commencement of the Act shall be duly infeft in any lands which have been feued, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior—to the same effect as if such superior had granted a writ of confirmation

according to the existing law and practice.—A testator, who died on the 5th of March, 1873, conveyed to trustees by trust disposition his whole heritable estate. The trustees were *inter alia* to pay certain legacies and gradually extinguish the testator's debts; after which they were to entail the lands upon *P. R.*, the heir-at-law of the testator, if then alive and of the age of twenty-five, and his heirs male, whom failing certain other persons. Heirs female were to be excluded, and the trustees were given power to sell or excamble any part of the lands. The trustees became infeft in the estate by recording a notarial deed in the register of sasines in March, 1874. In part of the lands the testator had been the last entered vassal; and the superior, of those lands, demanded from the trustees a casualty of composition of a year's rent on the ground that they were singular successors. The trustees contended that they were not liable for any casualty whatever, the heir *P. R.* being willing to enter with the superior and pay a casualty of relief—a duplicant of the feu duty—but that, in any event, they were only liable for a casualty payable by an heir. —*Held* (affirming the decision of the Court below), that the trustees being impliedly entered with the superior, and being singular successors of the last vassal, were liable in a casualty amounting to a year's rent; and that the heir of the last entered vassal could not now be tendered to the superior for entry, and so relieve the trustees of payment of the higher casualty.—*Ferrier's Trustees* v. *Bayley* (Court of Sess. Cas. 4th Series, vol. iv. p. 738), and *Rossmore's Trustees* v. *Brownlie* (Court of Sess. Cas. 4th Series, vol. v. p. 201), approved. Rankin *v.* Lamont - - 44

6. —— *Fishery — Salmon Fishing — Barony Title — Immemorial Possession.*] In 1774 the Crown granted to *L.* a barony charter to lands almost continuous on both sides of a river in *Inverness-shire*, included were older baronies containing express grants of salmon fishing to parts of the river some above and some below certain falls, also an ancient barony grant giving the fishing on the *Water of Forne*, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial *L.* had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives, just below the falls, which stretched right across the river, and which were narrower than then allowed by law. Above the falls he asserted his right (*a*) by occasionally fishing there; (*b*) by during the spawning season having watchers; (*c*) by taking his tenants in their leases bound to protect the fishing, and prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net and coble.—Neither the Crown nor anyone else had ever objected to *L.'s* entire possession of the whole salmon fishing in the river. The Crown now, while admitting *L.'s* right to the salmon fishing below the falls to be incontestible, claimed, *de jure coronæ*, all the fishing above the falls:—*Held*, affirming the decision of the Court below, that the river here was a *unum quid*—one continuous and connected subject—and that *L.'s* entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits and *ex adverso* his barony lands wherever situated:—*Held*, also, that this decision was without prejudice to any right of the Crown or its grantees to the salmon fishing *ex adverso* the ancient barony lands of *C.*, which were lands on the banks of the above-mentioned river intermixed with *L.'s* barony lands.—See Lord *Blackburn's* opinion (p. 311) as to the extent of a grant to take fish by yairs or cruives. The Lord Advocate *v.* Lord Lovat - - - - 273

7. —— *Entail—Disentail—Value of "Expectancy or Interest" of Second and Third Heirs Substitute—Relevancy of all Facts calculated to affect the Life of the First or Intermediate Heir—Chance of succeeding to the Fee Simple to be calculated —Entail Amendment (Scotland) Act*, 1875, *s.* 5, *sub-s.* 2.] The heir in possession of an entailed estate in *Scotland* petitioned under the statutes for disentail. The first heir substitute gave his consent, but the second and third refused. In valuing the interest of the second and third heirs substitute, under the 5th section of the *Entail Amendment (Scotland) Act*, 1875, the questions arose (1) whether the probable duration of the life of the first heir substitute should be taken from the tables on the basis of his actual age, or whether his actual state of health should be ascertained by inquiry; he refusing to be medically examined, and the second and third heirs alleging that he had suffered from ailments which tended to reduce the probable duration of his life greatly below the average of persons of his age. And (2) whether, there being only one other heir in the entail existing, the second and third heirs' chance of succeeding to the fee simple by surviving all the other heirs of entail should be taken into account:—*Held*, reversing the decision of the Court below, (1) that all the facts tending to reduce the first heir's life below the average were relevant and should be taken into consideration; and (2) that the chance of succeeding to the fee simple ought to be valued. M'Donald *v.* M'Donald - - - - - 519

8. —— *Local Government Acts—Public Well—Public Health (Scotland) Act*, 1867, *s.* 89, *sub-s.* 4 —*Servitude—Right of Local Authority to repair a Well on Private Property.*] The *Public Health (Scotland) Act*, 1867, s. 89, sub-s. 4, provides that, "The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which had been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water.—Situated in one corner of a private

SCOTCH LAW—*continued.*

field in the parish of *Denny* is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of *Denny* there is a cart road. The inhabitants of *Denny* had for the prescriptive period used the water of the well for domestic purposes, and had had the well, *inter alia*, cradled with stones at their own expense. Up to 1877 *Denny* was a mere village without any burghal territory. But in that year *Denny*, with the adjoining village of *Dunipace*, was constituted a police burgh under the provisions of 25 & 26 Vict. c. 101, and the police commissioners of the burgh then became the local authority under the *Public Health (Scotland) Act*, 1867 (30 & 31 Vict. c. 101). —In 1878 the commissioners, in their character as local authority, and under the authority of subsect. 4, sect. 89, of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a hand pump with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against the local authority praying for removal of the cover and pump, &c.:—*Held*, affirming the decision of the Court below, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers. Smith *v.* Archibald - - - - **489**

9. —— *Railway—Mines and Minerals—Statutory Notice to purchase by Railway Company—Railway Clauses Consolidation (Scotland) Act*, 1845 (8 *& 9 Vict. c.* 33), *ss.* 70, 71, 72.] Though a mine owner may give notice under the statutes 8 & 9 Vict. c. 20, and c. 33, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter-notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing.—By the 70th section of the *Railway Clauses (Scotland) Act*, 1845, the minerals under a railway remain the property of the owner of the land, unless they are expressly purchased by the company.—The 71st section provides that if the owner or lessee of minerals not purchased by the company is desirous of working them, he shall give the company notice in writing of his intention to do so thirty days before the commencement of working. Power is given to the company "on the receipt of such notice" to inspect the mines, and if they are desirous that such mine or parts thereof should be left unworked, and if they are willing to make compensation therefor, they are empowered to give notice to that effect. If such notice is given, then it is declared that the owner or lessee shall not work the mines or minerals comprised in such notice.—The 72nd section provides that if before the expiration of such thirty days the railway company do not give notice of their desire to have such mines left unworked, it shall be lawful for the owner or lessee to work the said mines in such manner as such owner or lessee shall think fit for the purpose of getting the

SCOTCH LAW—*continued.*

minerals contained therein —*A.* and *B.* were the lessees of the minerals, viz., limestone, under a railway passing through *Caldwell*. They, on the 8th of July, 1878, gave notice in terms of the above sections to the proprietors of the railway that they were desirous of working, and intended to work, the "mines and minerals including limestone" lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to *A.* and *B.* of their desire to have such mines and minerals left unworked, but they did give such notice on the 20th of February, 1879, offering compensation for the limestone unworked. *A.* and *B.* contended that the notice of the 20th of February, 1879, was too late to prevent them working out the limestone; such notice to be valid required to be given before the expiration of thirty days from the date of their notice of the 8th of July, 1878:—*Held*, affirming the decision of the Court below, that the notice of the railway proprietors was valid.—*Held*, also, that the incidental *dictum*—that after thirty days had expired the time had passed for the railway proprietors to give a counter-notice—in *Smith* v. *Great Western Railway Company* (3 App. Cas. at p. 182) was no judicial authority here, being said where it was in no way material for the decision, and where the point could not have been fully argued; no counter-notice having been given in that case. Dixon *v.* Caledonian and Glasgow and South Western Railway Companies - - - - - **820**

10. —— *Teinds—Res Judicata.*] The minister of the parish of *B.*, *Scotland*, in 1875 raised an action of augmentation, modification, and locality, against the heritors. A scheme of locality was prepared, *D.* lodged objections to the scheme, in so far as it localled minister's stipend on eighty-one acres of his land, alleging that these eighty-one acres were held under titles *cum decimis inclusis et nunquam antea separatis*, and that in respect of certain judicial proceedings in 1795 and 1807 it was *res judicata* that these lands were so held.—The proceedings relied on were as follows: In 1795 the then minister of *B.* raised an action of augmentation, &c., and produced a rental of the whole lands in the parish, in which he included the eighty-one acres in question as liable for teinds. The ancestor of *D.* "and the other heritors" lodged a minute stating, *inter alia*, that these eighty-one acres were held *cum decimis inclusis*, and craving that they might be struck out of the rental. On the 2nd of December, 1795, the teind Court pronounced an interlocutor ordering them to be struck out. Rectified schemes of locality were prepared, and objections lodged by other heritors, but the proceedings were not carried out to a final decree. In 1807 the same minister raised a new action of augmentation, &c., which, after certain objections were disposed of, proceeded to a final decree. In none of the schemes of locality since 1795 were the eighty-one acres included:—*Held*, reversing the decision of the Court below, that the plea of *res judicata* was well founded. Dundas *v.* Waddell - - **249**

SEIZURE OF SHIP—Slave trade - - **548**
See Slave Trade.

SHIP—*Charterer—Discharging Cargo, Means for.*] The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time:—*Per* Lord *Hatherley*: When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port.—A charterparty was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of *East London*, in *South Africa*. In the charterparty was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the Governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favour of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the Government or of private individuals. The ship arrived at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:—*Held*, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage. Postlethwaite *v.* Freeland - - - - - 599

2. —— *Regulations for Preventing Collisions at Sea*—36 & 37 *Vict. c.* 85, *s.* 17.] The "Regulations for Preventing Collisions at Sea," made under the authority of the *Merchant Shipping Acts*, 1854 to 1873, must, under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance.—The *K.* and the *V.*, two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The *K.* alleged that when the two vessels were fast approaching each other, the *V.* improperly changed its course; that the master of the *K.* could not rely on the *V.* taking a particular course: that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the Regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the *K.* to be excused under the circumstances of the case, and had given judgment against the *V.* On appeal to this house:—*Held*, that the Statutes and the Regulations had not left the master of the *K.* a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger, he had disregarded the Regulations, and consequently that the *K.* must be held in part responsible. — The judgment of the Court of Admiralty was restored. Stoomvaart Maatschappy Nederland *v.* Peninsular and Oriental Steam Navigation Company. The Voorwarts. The Khedive - - - - - 876

—— Register of - - - - 548
See Slave Trade.

SINGULAR SUCCESSORS—Scotch Law - 44
See Scotch Law. 5.

SLAVE TRADE—*Seizure of Portuguese Ship in Harbour—Obligation of Seizor to justify his Acts—Absence of reasonable Ground of Suspicion—Primâ facie Evidence of Slave Trading—Treaty with Portugal*—6 & 7 *Vict. c.* 53.] The "*O.*" a Portuguese vessel, was seized on the 5th of December, 1876, whilst lying at anchor in the harbour and port of *F.*, in *Sierra Leone*, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the *Slave Trade Act*, 1873), but was subsequently released by the Court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:—*Held*, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be *primâ facie* evidence of a vessel being engaged in the slave trade, both by the treaty between *England* and *Portugal*, carried into effect by 6 & 7 Vict. c. 53, and by the *Slave Trade Act*, 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade.—The obligation upon a seizor to justify the seizure under the *Slave Trade Acts* of a vessel plainly engaged in *bonâ fide* trade within a harbour is a very strict obligation.—*The Ricardo Schmidt* (Law Rep. 1 P. C. 268; S. C. 4 Moore, P. C. 121) approved.—A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free labourers, and not of consigning them to slavery, would not have justified the seizure and detention of the vessel.—According to the true construction of the Portuguese treaties, the consent on the part of *Portugal* that certain articles mentioned in the

SLAVE TRADE—*continued.*
first schedule to the *Slave Trade Act*, 1873, when found on board a Portuguese vessel, shall be considered as *primâ facie* evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The 4th section, therefore, of the Act cannot be extended to a Portuguese vessel lying in British waters. The Queen *v.* Casaca - - 548

STAKEHOLDER—Wager - - - 342
See New South Wales, Law of. 3.

STATUTE— Construction — "It shall be lawful" - - - - - 214
See Ecclesiastical Law.

STATUTES:
3 & 4 Will. 4, c. 27—*Limitations* - - 736
See Limitations, Statute of.
3 & 4 Vict. c. 86, s. 3—*Church Discipline* 214
See Ecclesiastical Law.
3 & 4 Vict. c. 113—*Ecclesiastical Duties* 736
See Limitations, Statute of.
6 & 7 Vict. c. 53—*Slave Trade* - - 548
See Slave Trade.
8 & 9 Vict. c. 18—*Lands Clauses* - 1, 425
See Lands Clauses Act. 1, 2.
8 & 9 Vict. c. 33, ss. 70, 71, 72—*Lands Clauses, Scotland* - - - - 820
See Scotch Law. 9.
14 Vict. No. 9, s. 8—*New South Wales* - 342
See New South Wales, Law of. 3.
19 & 20 Vict. c. 60, ss. 6, 11—*Scotland* - 754
See Scotch Law. 1.
19 & 20 Vict. c. 97, s. 6—*Scotland* - 754
See Scotch Law. 1.
27 Vict. No. 6—*Cape Colony* - - 842
See Griqualand, Law of.
29 Vict. No. 59—*Waste Lands, New Zealand*
See New Zealand, Law of. [70
30 Vict c. 3, ss. 91, 92—*British North American Act* - - - - - 409
See Canada, Law of. 8.
—— —— s. 92, sub-s. 14 - - - 115
See Canada, Law of. 2.
30 & 31 Vict. c. 101—*Public Health, Scotland*
See Scotch Law. 8. [489
31 Vict. No. 64—*Waste Lands, New Zealand*
See New Zealand, Law of. [70
31 & 32 Vict. c. 40, ss. 3, 5—*Partition* 651
See Partition Suit.
31 & 32 Vict. c. 121—*Pharmacy Act* - 357
See Pharmacy Act.
32 & 33 Vict. c. 71, s. 37—*Bankruptcy* - 161
See Bankruptcy.
36 Vict. c. 82—*Canadian Railways* - 381
See Canada, Law of. 3.
36 & 37 Vict. c. 85, s. 17—*Merchant Shipping Act* - - - - - 876
See Ship. 2.
36 & 37 Vict. c 88—*Slave Trade* - 548
See Slave Trade.
37 Vict. c. 10—*Canada* - - - 115
See Canada, Law of. 2.

STATUTES—*continued.*
37 & 38 Vict. c. 94, ss. 4, 5—*Conveyancing, Scotland* - - - - 44
See Scotch Law. 5.
38 & 39 Vict. s. 31—*New South Wales* - 63
See New South Wales, Law of. 1.
38 & 39 Vict c. 61—*Entail (Scotland)* - 519
See Scotch Law. 7.
39 Vict. c. 2—*Quebec Act* - - - 381
See Canada, Law of. 3.
40 Vict. c. 41, s. 28—*Canada* - - 409
See Canada, Law of. 6.
41 Vict. c. 13, s. 1—*Scotland* - - 754
See Scotch Law. 1.

SUCCESSION—Disposition—*Mortis causâ* - 787
See Scotch Law. 4.

SUPERFLOUS LANDS—Railway—Onus of proof
See Lands Clauses Act. 2. [1

SUPERIOR AND VASSAL—Scotch law - 44
See Scotch Law. 5.

SURFACE DAMAGE—Mining operation - 25
See Mine.

TIENDS—*Res judicata* - - - 249
See Scotch Law. 10.

TRUSTEE—Liability of—Scotch law - 44
See Scotch Law. 5.

TURKEY—Consular Court—Procedure - 564
See Consular Court.

ULTRA VIRES ACT—Transfer of railway—Law of *Lower Canada* - - - 381
See Canada, Law of. 3.
—— Working agreement—Railway - 473
See Railway.

VACATION—Order made in—Time for appeal
See Practice. 2. [685

VALUATION—Partition suit - - 651
See Partition Suit.

VENDOR AND PURCHASER—Scotch law—Conditions of sale—Warrandice - 925
See Scotch Law. 3.

VOLUNTARY GIFT—Law of *Lower Canada*—Revocability - - - 138
See Canada, Law of. 1.

WAGER—Right to recover deposit from stakeholder - - - - 342
See New South Wales, Law of. 3.

WARRANDICE—Clause of—Scotch conveyance
See Scotch Law. 3. [925

WAY-LEAVE—Mine - - - 25
See Mine.

WILL—*Annuity—Corpus of the Estate—Residue.*] A testator appointed his wife and two other persons his trustees and executors—he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real and personal estate, and to stand possessed of the money arising therefrom in trust to invest the same, and set apart a sufficient portion of such investments as will produce the annuity of £1200, "which I bequeath to my wife for her life," payable on the usual quarter days, "the first payment to be made on the first of

WILL—*continued.*

such days as shall happen after my decease, such annuity, in case of my wife's second marriage, to be reduced to the annual sum of £150," and subject to such investment to set apart £5000 for his daughter *Z.* "As to the entire residue of my trust estate, and as to that part set apart in favour of my wife, and as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage," in trust for three grandchildren:—*Held*, affirming the decision of the Court of Appeal, that this was the bequest of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted (as might be the case during the whole of her life), the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1200 a year, the deficiency was to be made good out of the corpus.—*May* v. *Bennett* (1 Russ. 370) and *Wright* v. *Callender* (2 De G. M. & G. 652) adopted. Carmichael *v.* Gee - 588

2. —— *Bequest to a Class—Remoteness*] In ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule.—The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members. — *Per* Lord *Selborne* L.C.: In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness.—A will contained a bequest of a particular sum of £3000 to the testator's daughter and her husband for life, and after their deaths "my will is that the sum of £3000, the securities for the same and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of £3000 was given to the son with exactly the same trusts for his issue; in default, over:—*Held*, that the bequest was void for remoteness.—*Held*, also, that the bequest being to a class, the parts of it could not be severed, so as to treat one portion as good, though the other was void.—*Hale* v. *Hale* (11 Ch. D. 643) approved. Pearks *v.* Moseley. *In re* Moseley's Trusts - 714

WILL—*continued.*

3. —— *Gift to A. and Children—Power of Appointment—Wild's Case* (6 *Co. Rep.* 17).] The rule in *Wild's Case* (6 Co. Rep. 17), even if only a rule of construction, is not now to be departed from.—It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's Case* applicable, on which the word becomes a word of limitation and not of purchase.—A testator by a will made in 1823 gave "the whole of my landed property situate, &c., to my eldest son *H. W.* and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son *C.* In case of *C.* dying without children or child lawfully begotten, I give the same landed property to my daughter *Harriet* and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet, and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right."—*H. W.* never had a child. *C.* died during the life of his elder brother, but left a daughter. *H. W.* after entering into possession, disentailed the estate, and devised it to his wife's nephew:—*Held*, that *H. W.*, by virtue of the rule in *Wild's Case*, took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters.—*Seale* v. *Barter* (2 B. & P. 485) approved. Clifford *v.* Koe 447

—— Mutual—Roman-Dutch law - - 123
See Ceylon, Law of.

WINDING-UP—Action against liquidator 317
See Scotch Law. 2.

WORDS—"It shall be lawful" - - 214
See Ecclesiastical Law.

—— "Poison" - - - - 857
See Pharmacy Act.

WORKING AGREEMENT — Railway — *Ultra vires* - - - - - 473
See Railway.

WRIT SPECIALLY INDORSED—Leave to defend - - - - - 685
See Practice. 2.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.